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VICTORIA.

SUPREME COURT.

INSOLVENCY JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

June 25.

Re BARTHOLOMEW MONAGHAN.

Insolvency Statute, 1871 (No. 379) sec. 138, sub-secs. i., vii., x., xi. Not keeping reasonable accounts—Fictitious capital, meaning of—Contracting debts without intending to pay, &c.—Unjustifiably disposing of property—Sec. 136. Grounds for dispensing with condition.

This was an appeal against a decision of Judge Quinlan, as judge of the Court of Insolvency, Melbourne, refusing a certificate of discharge to Bartholomew Monaghan, of Horsham, contractor.

MR. SKINNER appeared for the insolvent in support of the appeal; MR. DUFFY for the trustee in support of the decision of the judge of the Insolvent Court.

HIS HONOR, in giving judgment, said: This case comes before me on appeal from the decision of the learned judge acting in the Insolvent Court, Melbourne, refusing a certificate to Mr. Monaghan. Monaghan had been a mere laboring man, then a superintendent of works. About the end of 1879 he became entitled to land as a selector, and has since farmed it. He also took a number of contracts for works for shires, &c. He opened an account with the Colonial Bank of Australasia at the Horsham branch, of which Mr. Prytz was manager, and mortgaged his leasehold and selected land as security to the bank for his debt on account to it. He was little qualified for keeping account books, and kept scarcely any. I have not much material to measure the extent of his dealings or the amount of his property from time to time, as compared with his debts. He drew upon the bank for most of his payments of all kinds, and lodged with it most of his receipts upon contracts. His dealings, so far as measured by his pass-book showed as to the year 1880, payments about £830, lodgments about £500. At the end of 1881 he was about £700 overdrawn. At the end of 1882 he was £2100 overdrawn. During this year some transactions of loans by him to Prytz, the local manager, came into effect. At the time of his insolvency according to his schedule, his debt to the bank was £2550 about, secured by a mortgage for £1000; his debts to other creditors £222 about, his chattel property about £120, debts due by Prytz and wife, about £700 and the mortgaged land. The probable result of the insolvency proceedings is not 1s. in the £1 to the creditors. There are a set of odd transactions as between him and Prytz, commencing May 25, 1882, by insolvent signing a promissory note to Mrs. Prytz, for £86 4s., payable in four months at the Colonial Bank, Horsham. This the insolvent alleges was not filled up when he signed it, but admits he intended a loan to Prytz. This was circulated, and at maturity debited to insolvent's account in the Colonial Bank. There is a similar transaction June 21; July 31 a note to Prytz himself; July 31, another; then a series of cheques of insolvent for self continued to February, 1883, all given to Prytz as loans, making in all about £700. Insolvent says something of their being intended to be shown to the bank's higher officers, which I do not understand. Insolvent says that Prytz promised to provide payment for them, which he supposed was done, and therefore was surprised to see this £700 added to his debt to the bank. Insolvent alleges that when he applied to Prytz to be informed of the state of his bank account, he could not get information. He does not allege any distinct request and refusal at any time. Mr. Bilton, accountant of the bank, states distinctly that in July, 1882, he told insolvent that he was overdrawn £1600, and in December that he was overdrawn £2000. Those loans to Prytz went on to February, 1883. A few days after Mr. Boully, the bank inspector, had an interview with insolvent as to means of payment of his overdraft of about £2500. Insolvent said £800 was due to him by a shire council, that a person owed him a large sum, that his land was worth £800, his plant £800, cattle £100, cash £80. In the result £348 only was paid by the shire council. The bank sold the land by private contract for £600 about. Insolvent afterwards paid about £340 to the bank. As to the plant, the insolvent estate got £23 only. There were parts of the plant to the value of about £54, which insolvent says he sold to his son, Martin, about March, 1883, for cash, which he spent in paying small debts and for his living, filing schedule, &c. The insolvent was forced to a certificate examination. The bank procured the removal of the insolvency matter to Melbourne. The insolvent was examined several times. Notice of objections to his certificate was served March 21, 1884. Prytz, Boully, and Bilton were examined as witnesses against him. The insolvent wanted to be examined on his own behalf, and was refused—as to the propriety of which, by consent of parties, I need give no opinion. The objections to the grant of a certificate are—First, that the insolvent did not keep reasonable accounts or entries of his receipts and payments. It has been argued by his counsel that the bank keeping his account was enough. The bank account was not in any sense a complete account of his receipts and payments. It was not an account upon which he could be examined; not evidence against him. The necessity for his accounts may arise as to dealings between him and the bank. As to his being illiterate and incapable, I have been referred to several cases. In *Smith, in re*, 1 A. J. R., 105, I said, "He was a shoemaker, and did not appear to have persons in his employment; he was also an illiterate man; and to refuse

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his certificate on the ground of his not keeping books would be in effect saying that an illiterate man on going into business must hire a man to keep his accounts, or run the risk of losing his certificate." I have much doubt whether a man having business to the extent and complexity of the present insolvent should not be obliged to hire the man. But the present insolvent does not say that he tried to the best of his ability to keep accounts. I have no reason to say that the omission was with an intent of fraudulent concealment, or materially affected the inquiry (*Schlieff, in re*, 6 V. L. R. 53.) As to some transactions between him and his son the insolvent's statements would be more satisfactory if he kept usually accounts of receipts and payments of money in accordance with his evidence. On the whole I think the objection to be sustained, but the offence to be adequately punished by suspension. The second objection is that he being a trader, carried on trade by means of fictitious capital, inasmuch as during three years and upwards, next prior to the sequestration of his estate, he entered into extensive contracts and works, and farming operations without means, relying solely on the chance of moneys being supplied to him by the Colonial Bank of Australasia. Trading with fictitious capital is a matter somewhat hard to define, but it must mean that the insolvent has made some false statement, or acted in some way so as to produce a false opinion about his capital. There is nothing of the kind here. The enlarged explanation seems to me nonsensical. The third objection is that "You have contracted each of the debts undermentioned to the Colonial Bank of Australasia without, in fact, intending to pay, or having, at the time you contracted such debts, any reasonable or probable expectation of being able to pay the same," and then follow the several debts which insolvent contracted by loan to Prytz. I don't see that these debts would ground the charge more than any other debt he contracted in his overdraft to the bank. They had the aggravating circumstance that they were not for business liabilities. But take the debt £30, February 12, 1883. He had been distinctly informed by Bilton in December that he owed the bank £2000. He had increased that debt by £500; he owed a good deal to other creditors. Credit him with land worth £1000, as in schedule; as to shire's debt, all that was paid (£348); as to his plant £54 worth, which he says he sold to his son, and £23, all his trustee got—and as to the shire debt and plant, he does not complain of his property being sacrificed—the deficiency seems such that he could not reasonably expect to pay. I would not regard the prospect of payment of £700 by Prytz. In deference to *in re Bryant*, 4 W. W. and A'B. 7, I hold this objection sustained, but not to an extent to call for refusal of certificate. The fourth charge is that he, being indebted to the bank did, between February and June 1, 1883, unjustifiably make away with or dispose of otherwise than *bona fide* and for valuable consideration the following chattels:—Two horses, one waggon, picks and shovels, to his son Martin. As to those items, so far as admitted, the insolvent states that he sold them from time to time at prices cash exactly stated, that he spent the money as I have stated, and as seems probable. There is no imputation of the goods having remained in his apparent possession like the property *in re Allen*, 2 W. W. and A'B. 3. On the whole, though doubtingly, I hold this objection not sustained. As dispensing with payment of 7s. in the £, the insolvent's affidavit relied on the loss of £150 on one contract from very dry weather, £100 on another from flood (other contracts were profitable), losses of cattle by poisoning (extent not shown), the bank having stopped giving him credit, which was fully warranted. Nothing of such misfortune as, I think, should be regarded to dispense with payment of 7s. in the £. I order that the order of the Insolvent Court, Melbourne, of May 20, 1884, be varied so far as it finds that the insolvent, Bartholomew Monaghan, has been guilty of, as a trader, carrying on trade by means of fictitious capital, has been guilty of unjustifiably disposing otherwise than *bona fide* and for valuable consideration of various chattels, and order in lieu of the said order that the certificate of the said insolvent be absolutely suspended for one year from the 20th day of May last, on the grounds that he has not kept reasonable and proper accounts of his dealings, and that he has contracted debts without in fact intending to pay, or having at the time he contracted them any reasonable or probable expectation of being able to pay the same; and declare that the affidavit filed by the said insolvent does not afford reasonable ground for dispensing with the condition of paying 7s. in the £, without prejudice to his renewing his application to have the same dispensed with.

Appeal allowed. Order of the judge of the Insolvent Court varied by directing that the certificate be suspended for 12 months.

INSOLVENT COURT.

(Before His Honor Judge Quinlan.)

Re HENRY TRUMP (DECEASED).

June 25.

Landlord and tenant—Insolvency of tenant—Right of landlord to appear and vote at general meeting—Particulars of proof of debt not furnished—Appeal from chief clerk—Costs.

The Court sat to hear objections referred to it by the chief clerk in the estate of Henry Trump, of Melbourne, hotelkeeper, deceased. A general meeting was held in the estate on Monday, 23rd inst., at which Mr. P. O'Brien, landlord of the hotel which had been occupied by the deceased, sought to prove a debt of £224 5s. on the estate. The debt was for three months' rent prior to insolvency.

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The proof of debt was objected to on the ground that it was a preferent claim which would have to be paid in full, and it was submitted that the creditor was in the position of a secured creditor, who could only prove for the amount due to him in excess of the value of his security. The chief clerk decided that the creditor had a right to appear at the meeting, and vote as a creditor, as, although he was to be paid in full, that was a matter touching the distribution of the estate, and did not deprive him of his status as a creditor, and of the right to vote at a general meeting. At the request of the objector the point was, however, referred by the chief clerk to the Court. At the same general meeting, held on Monday, Mr. T. J. Davey, as trustee for the estate of Lizzie Trump, widow of the insolvent, presented a proof of debt for £1022 15s. 4d., but it was objected to by Mr. Jacomb, as proxy for Kirkby and Co., on the ground that there were no particulars furnished. The chief clerk rejected the proof, on the ground stated, but referred the the question to the judge at the request of the objector.

Both points were argued this morning before His Honor. Mr. Fink appearing in support of Mr. Davey's proof and against Mr. O'Brien's; and Mr. Braham appearing on the other side in each case.

His Honor, in giving his decision, said that he should uphold the decision of the chief clerk on both points. His opinion was that a preferential creditor could appear at the meeting, and also that the particulars given in the second case were not sufficient. He should also follow the principle adopted in other courts, and should take the cases as in the nature of appeals from the decisions of the chief clerk, and allow £2 2s. costs to Mr. Braham.

Lunacy Jurisdiction.
(Before Mr. Justice Molesworth.)

May 1.

Re Walter Henry Marris (a lunatic).

Where a person has obtained an order appointing him committee of the person and estate of a lunatic, but has been unable to give the necessary security, the Court will not appoint the executor of a will under which the lunatic is entitled to property as committee in his place without a reference to the master.—Where the committee of a lunatic has died having incurred costs, his personal representative is the proper person to move for re-imbursement out of the estate.

Mr. Neighbour applied for an order revoking the appointment of Wm. A. Marris as the committee of the person and estate of the lunatic, and appointing Wm. Martin as committee in his place. Wm. A. Marris had been appointed committee by order of the Court of 26th June, 1882, but had been unable to find the necessary sureties, and it was desired to appoint a new committee. It was also asked that an order should be made for the payment of costs of a previous committee who had died. The facts sufficiently appear from the judgment.

His Honor said: Mr. Thomas Marris died leaving some property and sons—Messrs. Walter Henry, John Thomas, William Alfred Thomas, another son, and a daughter; in all five. By his will he appointed executors, and the survivor of whom appointed Mr. Wm. Martin his executor, who held Thomas Marris' property as to one-fifth for Walter Henry Marris, who had become a lunatic for many years in public lunatic asylums. John Thomas Marris took proceedings to have him formally found a lunatic, and obtained a reference to the Master in Lunacy to report as to property and maintenance, and appoint a committee of the person and estate, and by an order made on March 14, 1878, he was himself appointed, and incurred costs which the Master reported should be paid. But he seems to have done nothing else. He died Aug. 1, 1880, and his brother, Wm. Alfred Marris, on June 26, 1882, obtaining an order appointing him committee on giving security, but was unable to procure it. He did nothing. Mr. Wm. Martin now applies with the consent of Wm. Alf. Marris and the solicitor of John Thomas Marris, and some testimonial of fitness that the order of June 26, 1882, be revoked, and that he (Wm. Martin) may be appointed committee, and that the estate of the lunatic now in his hands, as representative of Thomas Marris may, after payment of the costs of the application, and the costs, charges, and expenses of the petition in the matter, and of and incidental to the inquiry, and the proceedings for the appointment of John Thomas Marris be invested, and the proceeds applied for the maintenance of the lunatic. I am not prepared to appoint Martin as committee without a reference to the Master, but if he wishes to take the carriage of an order, shall refer it to the Master to inquire and report of what the estate of the lunatic now consists, and to appoint a proper person to be committee of the person and estate, and to approve of the security to be given by such person. Reserve further directions and costs. As to the costs of John Thomas Marris, it may be a question how far they should be allowed, and it is for his present representative to move for them. I shall direct the Master, on the application of such personal representative, to tax them so far as he thinks they should be allowed; also refer as to maintenance.

Probate Jurisdiction.
(Before His Honor Mr. Justice Molesworth.)

June 26.

In the Will and Codicil of Janet Eliza Mitchell.

Practice — Probate — Will and codicil — Probate granted to executor of will.

The testator made a will appointing two executors, he subsequently made a codicil, by which he revoked the appointment of one of the executors of

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his will, and appointed a fresh executor to his codicil. The codicil did not revoke the will in any other respect. The executor of the codicil renounced probate.

MR. TOPP moved that probate of the will and codicil be granted to the remaining executor of the will.

HIS HONOR granted the application.

June 26.

IN THE WILL OF GEORGE DODD.

Practice—Probate—Jurat of affidavit not showing month in which affidavit was sworn.

The jurat of the affidavit of the executors did not state the month in which the affidavit was sworn.

DR M'INERNEY submitted that the omission was a mere clerical one and immaterial.

HIS HONOR refused the application, and held that a fresh affidavit would be necessary.

IN THE WILL OF HENRY NORTH. June 26.

Practice—Probate—Two wills—Second will appointing no executors—Probate of both documents to executors of first will.

The testator made a will disposing of all the property he was then possessed of and appointing executors. He subsequently acquired other property and disposed of it by a second will, appointing no executors, and not mentioning the first will in any way

The advertisement was for probate of the will and codicil.

MR. NEIGHBOUR applied for probate of both wills to the executors of the first will. As the second will did not revoke the first, the two documents can be taken as constituting one will (*In the goods of Griffith*, L. R. 2 P. & M. 457).

HIS HONOR, after expressing doubt as to whether the advertisement was regular in calling the second will a codicil, granted the application following *In the goods of Griffith.*

June 26.

IN THE WILL OF JAMES HARVEY.

Practice—Probate—Alteration of will after attestation

The testator by his will left his wife sole executrix, and appointed two trustees who were to act only in the event of his wife dying before him. The name of one of the trustees had been struck out after attestation. The affidavit of the executrix stated that the alteration had been made by her at the request of the testator and in his presence.

MR. BARRETT moved for probate of the will as altered to the executrix.

HIS HONOR granted probate of the will as it originally stood.

June 26.

IN THE WILL OF FRANCIS ANDERSON.

Practice—Probate—Mis-statement of date of execution of will in affidavit.

The testator left a will bearing date the 18th August, 1875, The affidavit of the executrix stated that the will was executed on the 18th August, 1874.

MR. TOPP moved for probate to the executrix and submitted that the error was a mere clerical one, and immaterial.

HIS HONOR refused the application, and held that a fresh affidavit was necessary.

Re FRANCES JOLIFFE.

Probate—Married woman—Caveat lodged on ground that testator had no separate estate—Practice—Costs.

Rule *nisi* calling upon the caveator, the husband of the testatrix, to show cause why probate should not be granted to William Bassett, the executor.

MR. TOPP moved the rule absolute; MR. FINK showed cause.

The question here was whether the testatrix had any separate estate. All that could be considered so was about £300 in the Melbourne Savings Bank in her name, said to be from savings in a business carried on by her apart from her husband, who now claimed it.

HIS HONOR said it was his custom to grant probate if there was any separate property besides that in dispute, and leave the question as to how much for future consideration. On the whole, he would make the rule absolute, without prejudice, as between the husband and the wife's representatives as to its being separate property, and would give no costs.

SOUTH AUSTRALIA.

SUPREME COURT.

IN BANCO.

(Before Way, C. J.) June 23.

RAMSAY, COMMISSIONER OF RAILWAYS (APPELLANT) v. TAYLOR (RESPONDENT).

Railway — Liability of Commissioner — Fires—Negligence—Practice. In an action against the Commissioner of Railways for damage to the plaintiff's land, caused by a fire spreading from the railway line it was shown (1) *that one of the commissioner's servants saw the fire prior to its spreading to the respondent's land, but failed to give any signal of its existence, or to take any steps towards putting it out; and* (2) *that the line between the respondent's fence and the rails had not been properly cleared away, a certain mallee stump with withered shoots growing therefrom, which enabled the fire to communicate with the herbage and vegetation* Held, *that these facts were sufficient evidence of negligence to go to a jury. Although the Local Court Act provides "that the notice of appeal shall be in writing, signed by the party appealing or his attorney, and shall be lodged with the clerk of the court, or sent to him by post," it is sufficient if such notice be sent by telegraph.*

This was a motion for a new trial, or to enter a nonsuit or verdict for the defendant (the appellant). The case was originally tried at the Port Augusta

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Local Court, and a verdict entered for the respondent for £25.

The respondent was the owner of certain land adjoining the railway line between Port Augusta and Quorn. In the early part of the year one of the defendant's locomotives drawing a ballast truck was proceeding up the line, and on nearing the plaintiff's land a servant in the employ of the appellant, who was travelling in an open truck, saw a fire within the boundary of the railway reserve, and which subsequently spread over the respondent's land and did considerable damage. It was proved that although the official observed the fire he failed to give any signal of its existence or take any steps towards putting it out. It was also shown that "skimming"—the destruction of the vegetation between the rails and the fence—had been rendered ineffectual by reason of a mallee stump and withered shoots affording means of communication for the fire to cross the "skimmed" strip of land.

V. F. Smith, for the respondent: The notice of appeal is not in the form prescribed by the Act. Sec. 56 of the Local Court Act 1861 provides "that if any party shall be dissatisfied with the determination of a Local Court upon a point of law or upon the omission or rejection of evidence, such party may, upon giving such notice as hereinafter mentioned, appeal to the Supreme Court . . . Provided that the party so dissatisfied shall either during the then sitting of the Local Court or within 12 days thereafter give notice in writing to the clerk of the Court of his intention to apply to the Supreme Court for an order or rule in pursuance of this provision." Section 58 provides "that the notice of appeal shall be in writing, signed by the party appealing, or his attorney, and shall be lodged with the clerk of the Court, or sent to him by post." In this case, the notice was sent by telegraph.

W. V. Smith, for the appellant: The notice was signed by the appellant's attorney, and delivered to the telegraph clerk. Any authorised person could sign on behalf of the attorney, and the presumption is that the telegraph clerk at the terminus of the message was authorised to sign on behalf of the sender.

Way, C. J.: Although the Act says that the notice of appeal shall be in writing, and lodged or posted, I do not think it is a sufficient objection that the notice was sent by telegraph. The telegram bore in the first place the signature of the party appealing, or his attorney or agent; and at the other end of the telegraph line the officials would be the agents of the sender. The objection will be overruled.

W. V. Smith now moved the rule *nisi* absolute.

V. F. Smith showed cause. The question of negligence was one for the jury. It was the duty of the Commissioner to keep the line in such a reasonable condition as to prevent a fire spreading.

W. V. Smith (*contra*): It was the practice but not the duty of the Commissioner to "skim" the ground adjacent to the rails. It was as much the duty of the respondent to keep the land inside his boundary clear from inflammable material as it was the duty of the Commissioner to keep it clear on the other side, if any such duty devolved on either. There was no evidence that the fire was caused by the act of the Commissioner or his servants. Before a verdict for the respondent could stand it was necessary that he should show that the appellant caused the damage by an act of real and substantial negligence (*Vaughan v. The Taff Vale Railway Company*, 28 L. J. Ex. 41; *Smith v. London and South-Western Railway Company*, L. R. 5 C. P. 98, and L. P. 6 C. P. 14).

Way, C. J., now delivered the judgment of the Court:—The Act of 1874 imposes upon the Commissioner of Railways the same liabilities as if the undertaking were carried on by a private company or companies. The verdict was given in the Court below, on account of the burning of the respondent's paddocks, in consequence of a fire which arose upon the railway near Quorn. First, it is said that the commissioner is not liable because it is not shown that the fire was ignited by one of the railway engines. The evidence is that a ballast train was going up the line, and one of the men who were in the train saw the fire as the train passed. It originated on the line and spread to the adjacent land, and burnt the respondent's paddocks. In cases of this kind it would be almost impossible to get more direct evidence than that before the engine went along there was no combustion, but immediately the train passed the fire arose. The natural inference would be, as spontaneous combustion is a somewhat rare phenomenon, that the fire was caused by a spark from the engine. That was the opinion of the jury who heard the case. It was held in the case of *Smith v. The London and South-Western Railway Company* that that was sufficient evidence to go to the jury. It is not sufficient to show that the fire originated in consequence of a spark from the engine, because the Act of Parliament specially authorises the use of locomotive engines, and modern science has not yet furnished us with an apparatus which will absolutely prevent the emission of sparks, and therefore to say that the Commissioner of Railways should be liable for all fires would be to say that his liability should be absolutely a measure. Therefore the courts in England have held that if reasonable precautions are taken, and yet, notwithstanding such precautions, a fire arises, in England the company and here the Commissioner of Railways could not be held liable. So far, therefore, as the emission of the spark is concerned there is no evidence of negligence. But the case is put in two ways. In the first place it is said that one of the servants of the Commissioner saw the fire, and if he had given a signal the fire could have been put out. Secondly, it is said that the Com-

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missioner did not keep the line in such a reasonable condition as to prevent the fire spreading. On these points there was evidence to go to the jury. As regards the first point, one of the employés was riding in an open truck attached to the ballast train, and the evidence of the guard, the engine-driver, and the superintendent of the permanent way was to the effect that if the man had given the proper signal it would have been seen by some of the other persons who were in the ballast train, the engine could have been stopped and the fire put out. It is clearly the duty of any person having a fire on his premises to take proper precautions to prevent its spreading. No such step was taken here, and that ground would be sufficient to establish the liability of the Commissioner of Railways. But in my opinion there was also sufficient evidence on the other point. It is quite true, as submitted by the learned counsel for the Commissioner, that there is no positive law requiring the Commissioner of Railways to destroy all grass, herbage, and timber on the railways; but it is the practice of the commissioner to "skim" the line—that is, to destroy the herbage within a certain number of feet of the rails or of the boundary of the railways. Now it appears that on this particular spot there was an old mallee stump from which shoots had shot up, and over which the fire had travelled. When the fire ran along the grass on the line it seems to have come into contact with the dead branches of the mallee stump. It was a proper case to be submitted to the jury whether upon these facts there was negligence on the part of the Commissioner. In the case cited of *Smith v. The London and South-Western Railway Company*, the line had been cleared and the grass left in heaps, and it was said that the fire was occasioned in this way. There it was held that the company was liable. In the case of *Vaughan v. The Taff Vale Railway Company*, also cited, the second count alleged that the grass was growing upon a bank on the railway; that the company well knew it would be ignited if a spark fell upon it, and that the fire was originated in this way. The evidence failed to establish that point, but the Court of Exchequer held that if it had been proved the liability of the company would have been established. The present case may not fall within that of *Smith v. The London and South-Western Railway Company*, but it exactly falls within the allegation in the second count of *Vaughan v. The Taff Vale Railway Company*, and is covered by the dicta in both cases; that is, that the Commissioner was bound to take reasonable precautions to prevent a fire originating upon the railway from spreading. Here was what practically amounted to a tinder box left upon the line. The dead branches of the mallee ought to have been cleared away. It is certain, therefore, on both points, that there was sufficient evidence for the consideration of the jury, and the verdict must stand. Rule discharged with costs.

(Before Way, C.J., Boucaut, J., and Bundey, J.)
July 7.

REG. v. ———.

Gaming—Public place—The Totalisator Repeal Act (282 *of* 1883) *provides that every person betting or offering to bet by way of wagering or gaming in any public place or in any place to which the public shall have access . . . shall be liable, &c.* —Held *that a bet made within an enclosure on a racecourse which was set apart for the members of a club did not come within the provisions of this clause although such enclosure was previously a place to which the public were allowed access.*

Appeal from the Adelaide Police Court.

It was proved that the appellant made a bet of one shilling on the Morphetville racecourse on the 10th May, 1884; that such bet was made inside an enclosure which was surrounded by a picket fence about four feet high to which the public were not admitted; that both parties to the bet were inside the enclosure; that the enclosure had previously been portion of the grand stand enclosure; that to the grand stand and enclosure, except the portion fenced off, the public were admitted on payment of 10s. 6d.; that each person inside and outside the picket fence could converse freely, and those outside could see and hear, if they chose to listen, what was going on in the enclosure; that the only persons admitted inside the enclosure were the members of the S. A. Jockey Club; that the whole of the racecourse was the private property of the S. A. Jockey Club. The Police Magistrate held that such enclosure was a public place within the meaning of the act, or a place to which the public had access, and convicted the appellant.

SYMON, Q.C., for the appellant: The words of the case itself deal with a different condition of things to that contemplated by the Act. The case shows that the place where the wager was made was one to which the public was not admitted.

MANN, Q.C. (*contra*): The erection of the picket fence was for the purpose of evading the Act, and in construing the latter the Court must look at what the legislature intended to suppress. If the Legislature intended to stop at the suppression of betting in public places the Act would not have gone on to say, "or places to which the public shall be permitted to have access." If the club had provided a room, that would not have been a public place.

BOUCAUT, J.: It seems to me that the sole question is whether the appellant is within the words of the Act. I do not see how the distinction can be drawn between the privacy which exists in a garden and that which is established by the erection of a private room.

MANN, Q.C.: If a picket fence four feet high is to be admitted as evidence of privacy, then a crease chalked on the ground would also establish privacy, for there can be no degrees in such a matter.

BUNDEY, J.: It strikes me these words would require to be added to clause 2 to make your argu-

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ment conclusive, "Every person betting or offering to bet within hearing."

WAY, C.J.: I am of opinion that the case must be answered in favor of the appellant. It appears that the S. A. Jockey Club are the owners of the racecourse at Morphetville, and that the public had been admitted to this racecourse during the races on payment of a sum of money; but after the passing of the Totalisator Repeal Act last session a small piece of ground within the boundaries of the racecourse was fenced off by a picket fence four feet high, and to the piece of ground so enclosed no persons were allowed access except the members of the S. A. Jockey Club and the members of Tattersall's Club. No other persons than the members of these two clubs were allowed to enter the enclosure whether with or without payment. During the races in May last the appellant, who was a member of the Jockey Club, made a bet of one shilling within this enclosure, and the question this Court has to decide is whether he is liable to the penalty provided in Clause 2 of Act No. 282 of 1883. In determining that question it appears to me that it is only necessary to read the enactment itself, which says:—"Every person betting or offering to bet by way of wagering or gaming in any public place or in any place to which the public are or shall be permitted to have access whether on payment of money or otherwise . . . . shall be liable, &c." Now, was this a public place? Was it a place to which the public were permitted to have access? I am of opinion that it was private property, and that the owners of it were entitled to exclude or admit the public as they thought fit. Were the public, to use the words of the clause, "permitted to have access?" The special case sent up to us for our opinion finds that the public could not have access "whether on payment of money or otherwise." Therefore it seems to me only necessary to read the plain words of the enactment to answer the case. Mr. Mann has said that what took place was a palpable evasion of the Act. The answer to that is that we are not here to make the law, but only to expound it. If the legislature wanted to put down betting in private as well as public places it could easily have made a drastic law in plain terms so that everyone who ran might read. In other words if Parliament had wanted to prevent the Jockey Club or Tattersall's Club from betting, it would have been very easy to secure that object by clear language. But if we are to read the words as they stand, Parliament has not thought proper to do so. Hence there is no breach of the law and no penalty lies. With regard, therefore, to what Mr. Mann said about evasion of the Act, it is not necessary to anticipate such evasions. When a case of palpable evasion arises this Court, as it is bound to do, will be prepared to deal with it, but here we have only to give judgment with respect to admitted facts which appear on the case, and these facts do not bring the appellant within the penal clause of Act 282 of 1883. The case must, therefore, be answered in favor of the appellant.

BOUCAUT, J.: Mr. Mann says that this is an attempt to evade the Act and the spirit of the Act. With regard to the evasion I am with the learned counsel, because it is not our duty to sit here and encourage eva ns of any Act, but I do not understand the learned counsel when he speaks about "an evasion of the spirit of the Act" in a criminal case. The very foundation of the criminal law is that before a defendant can be found guilty he must come not only within the spirit of the Act, but within the literal words of the Act itself. So far as the learned counsel addressed his argument to the question of the evasion of the Act I am with him, but when he speaks of the "spirit of the Act" or "the intention of the legislature," the Court cannot listen to it. Mr. Mann says that betting in public places is one of the evils which the legislature, in Act 282 of 1883, intended to put down, and he says that the public had access to the enclosure where the bet was made and therefore it is a public place. Now I venture to say that, looking at the Act in its plain literal sense, such a case as that now before the Court is not one at which the Act points. This will easily be seen by reading the words referred to by my learned colleague. It is clear that the public had no access to this place, only members of the S.A. Jockey Club and of Tattersall's being admitted. The public had no more access to this reserve than they have to my garden, and to carry Mr. Mann's argument to its logical conclusion, if a bet made within this enclosure comes within the provisions of the penal clause a bet made in my garden would also come within its provisions. I am not speaking with any degree of friendliness to betting. If people choose to bet they are punishable if they do so at certain times and at certain places, but this is not a case in which this Court is to say that betting under such circumstances as those detailed here is punishable. If the legislature in its wisdom determines to say that there shall be no betting anywhere and that a bet made within the hearing of any member of the community is punishable, then people would be careful to bet in a whisper, but before they can be brought within a penal statute such as this the words of the enactment must be express. I concur in the view taken by my learned colleague.

BUNDEY, J.: It seems to me that in order to give effect to the argument of Mr. Mann, the following words should be added to the clause, "or within the hearing of any person." I am strengthened in that view by the knowledge which I gained elsewhere when the Police Act was under consideration. Those words were put into the Police Act to prevent all sorts of evasions which would otherwise have been possible. Those words are not here, and therefore we must assume that the legislature do

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not intend them to apply. We do not sit here, as the learned Chief Justice has pointed out, to make the law. We sit here to administer it.

Appeal upheld.

VICTORIA.

SUPREME COURT.

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham and Mr. Justice Holroyd.)

COOPER V. DANGERFIELD. June 30.

Nuisance—Plea on equitable grounds of acquiescence —Demurrer—Proof of acquiescence—Costs.

Action by the plaintiff against the defendant for a nuisance caused by the defendant's mill, &c. The declaration alleged that the nuisance was caused—first, by the defendants allowing large quantities of smoke and soot to issue from the furnaces; second, by allowing iron scale, ashes, and other offensive matter to proceed from the furnaces and scatter themselves over the plaintiff's premises; third, by causing a vibration in the plaintiff's house by a fan or blower on the defendant's foundry; fourth, by vibration caused by a Chilian mill; fifth, by allowing soot, &c., to accumulate between a wall on the plaintiff's land and a wall on defendants'. The defendants pleaded — firstly, not guilty; and secondly, on equitable grounds, that the defendants had carried on the business of ironfounders, which was a necessary and useful business, in a proper and inoffensive manner, and with the view of preventing a public or private nuisance they had, within the last three years, made large additions and improvements to their place, and that the plaintiff was aware of the alterations being made and the reasons for them; that he acquiesced in them, and was contented that they should be used for the purposes of the business. The plaintiff demurred to the plea as being no answer to his action, and he also replied to it, alleging that he sued for other matters than those referred to in the plea. The demurrer was not made till the occasion of the trial, when it was necessary to amend the plea. The jury found a verdict for the plaintiff as to the existence of the nuisance on the second, third, and fifth issues, but they held that the plea of acquiescence had been proved, and on that plea gave a verdict for the defendants. The question of law as to whether the second plea, if proved, was an answer to the action, now came on for argument. The plaintiff also contended that there was no evidence that he had ever acquiesced in the erection of the buildings by the defendant. The jury assessed the damages to the plaintiff at £200 if the Court should consider him entitled to any.

MR. WEBB, Q.C., and MR. ISAACS appeared for the plaintiff; DR. MADDEN and MR. TOPP for the defendants.

THE COURT held that the plea was bad. It amounted to this, that the defendant was carrying on his business in an inoffensive manner, and then he proceeded to make certain erections and improvements with the object of preventing any public or private nuisance arising from the works, and that these alterations resulted in causing the grievances of which the plaintiff complained; that the plaintiff was aware of the alterations and gave his consent, and he could not be heard to complain of the consequences. The plea was intended to raise the equitable doctrine that the plaintiff acquiesced or lay by; but to deprive the plaintiff of his remedy it must be shown that he did lie by and acquiesce. The only fact alleged here was that the defendants were making certain alterations in their works which they had a perfect right to do, and the plaintiff could not complain of them till the result showed whether they were likely to do him any injury or not. He knew the object of the works was to prevent a nuisance, but if it did not have that result he had a perfect right to complain.

Demurrer allowed; judgment on the second plea for the plaintiff. The verdict for the plaintiff for £200 to stand, with the costs of the trial, so far as the taxing master allowed them, and the costs of the demurrer, but not the costs of the rule.

July 2.

THE QUEEN V. QUINLAN *exparte* SAMPSON.

Mining Statute 1865 *(No.* 291,*) secs.* 230 *and* 244 *—Dissolution of partnership—Judge not taking accounts between the parties or taxing costs at proper time—Appeal not* certiorari *proper remedy.*

Rule *nisi* to quash a decree of the judge of the Court of Mines at Daylesford, in a suit of *Morin v. Sampson.*

SIR BRYAN O'LOGHLEN moved the rule absolute; DR. MADDEN showed cause.

MR. JUSTICE HIGINBOTHAM said that the suit was a partnership suit, in which the plaintiffs prayed for a dissolution of their partnership in a mining claim with the defendant Simpson, and that the assets should be sold and the rights of the partners adjusted. On November 16, 1883, the learned judge pronounced his decision, which was entered in the register of the Court in these terms:—"Decree as prayed, costs to the plaintiffs." It was alleged by the defendant that the judge did not, in fact, take the accounts between the parties; that he did not tax the plaintiffs' costs, as he was bound by the Mining Statute 1865, section 230, to do, at the hearing or at the time of pronouncing his decision, and that these acts were done after the decree was pronounced. It was contended for the defendant that the decree which had been drawn up, and which contained the particulars of the judge's decision upon these points, was really a second decree, which the judge had no power to make, and that therefore it was a nullity. The facts alleged by the defendant's affidavits to have taken place

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after 16th November were denied by the plaintiffs, but it was not necessary to decide upon the conflict of statements. Assuming the defendant's allegations to be correct, they only showed that the judge erroneously exercised his jurisdiction. He had, however, to make a decree such as it was alleged he pronounced, or such a decree as had been drawn up. Any of the parties might have appealed to the chief judge from the decree that was pronounced, or if dissatisfied with the terms of the decree as it was drawn up might have applied to the judge to settle it. Either of these proceedings would imply that the court had jurisdiction, though it had been exercised erroneously; but as the removal of the decree of the Court of Mines by *certiorari* was expressly prohibited by section 244 of the statute, it lay upon the party who sought to quash it in this way to show that there had been a manifest and total want of jurisdiction or fraud. This the defendant had failed to do. The rule to quash the decree and subsequent proceedings would therefore be discharged.

Mr. Justice Holroyd concurred. He was of opinion that this was not a matter for *certiorari*, because the judge clearly had jurisdiction to settle the decree. Assuming that he did not tax the costs or take the accounts between the parties at the time of making the decree, still it was within his jurisdiction to do so afterwards. The defendant's objection was practically that the decree as drawn up was not the decree as pronounced. The affidavits, however, showed that the defendant had received notice of the intention to draw up the draft decree, and he did not attend. If the decree was drawn up wrongly, the defendant could have applied to have it altered, in accordance with the decree as pronounced, and if the application for the alteration was refused, he could have appealed.

Rule *nisi* to quash the decree of the judge of the Court of Mines and the subsequent proceedings discharged.

July 4.

Hulls (respondent) v. The Commercial Bank (appellants).

Banker and customer—Dishonor of cheque—Banker not liable to customer for the dishonor of a cheque where the sum of money for which the cheque is drawn is not filled in in the body of the instrument.

Appeal from the County Court Melbourne.

The action was brought by the respondent against the appellants to recover damages for the dishonor of a cheque. The respondent in drawing the cheque had omitted to fill in the body of the cheque, but had in the left hand corner written "£5," otherwise the cheque was in the proper form. The appellants dishonored the cheque and returned it with the endorsement that it was irregular. The judge gave a verdict for the respondent, with 1s. damages.

Mr. Purves and Mr. Hodges for the appellants; Mr. Hood for the respondent.

Mr. Justice Higinbotham, in delivering the judgment of the Court, referred to *Saunderson v. Piper*, 5 Bing. N. C. 561, and *Garrard v. Lewis*, 10 Q. B. D. 30, and said that the statement in the body of a cheque is the dominant and essential mode of expressing this essential element of a valid complete instrument, viz., the sum of money, and until this portion is filled in the instrument is incomplete, and the banker is not liable to an action at the suit of the customer for refusing to honor on presentment a cheque thus imperfect.

Appeal allowed and judgment entered for the appellants, with costs.

Matthews v. Morrah. July 4.

Slander of title.—Caveat lodged against the issue of a lease on a fictitious claim on behalf of Her Majesty—Evidence of malice.

Rule *nisi* to enter a nonsuit.

Mr. C. A. Smyth and Mr. Box moved the rule absolute; Mr. M'Dermott and Dr. Madden showed cause.

The action was brought to recover damages for slander of title. The plaintiff was a selector of land near Warragul, and was entitled to a lease from the Crown. The lease was sanctioned by the Lands department, but before it was issued from the Titles Office a caveat was lodged by direction of Mr. Morrah, in which it was claimed that the Queen had an equitable interest in the land. It subsequently appeared that the Crown did not claim any interest in the property, and Mr. Morrah said that the only reason he knew why the caveat was lodged was that it was to protect the Commercial Bank, which had a claim against the land. He stated that he acted under the direction of the then Minister of Lands, but he could not remember the reasons why the order was given. The caveat was removed in a few weeks, but the plaintiff alleged that owing to the delay caused by its having been entered he sustained damage. He had made arrangements to mortgage the land, and had paid expenses in the preparation of the mortgage. The jury gave a verdict for the plaintiff, damages £17. The defendant applied that the plaintiff should be nonsuited, on the ground that no evidence had been given that he had acted from malice to the plaintiff. Malice was an essential ingredient to sustain an action for slander of title. The defendant had merely acted on the direction of the Minister. It could not be expected that after the time that had elapsed, and the great number of cases that came before him every day, that he should remember the details of this case.

Mr. Justice Holroyd said that the defendant had put in a purely fictitious claim on behalf of Her Majesty to this land. There was no pretence

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whatever that the Crown had any interest in it. That was sufficient evidence to go to the jury that the defendant was actuated by malice.

MR. BOX said that the defendant never saw the plaintiff, and could have no ill-feeling towards him, and, according to all the authorities, it must be shown in an action for slander of title that the defendant was influenced by malice.

THE COURT held that there was evidence of malice to go to the jury, and discharged the rule to enter a nonsuit.

GRANT v. GILLIGAN. July 5.

County Court Statute 1869 (*No.* 345), *sec.* 120—*County Court Rules*, 269 *and* 271. *Appeal—Appeal case irregularly drawn up—Respondent not agreeing to or dissenting from case prepared by appellant.*

Appeal from County Court, Melbourne.

MR. HODGES for the appellant; MR. HOOD for the respondent.

The action was brought by the appellant against the respondent, a police constable, to recover damages for false imprisonment. The judge nonsuited the appellant. The appeal case was drawn up by the appellant's attorney, and a copy was sent to the respondent's attorney, who made certain alterations in it. The case was then sent to the judge, who settled the statements in it without further communication with the respondent.

MR. HOOD contended that the appeal case was irregularly drawn up, as by the rules the judge had no power to settle a case until the respondent had stated whether he disapproved of the draft as prepared by the appellant, and that the respondent had not disapproved of it, but merely indicated his desire that certain alterations should be made.

THE COURT held that the case had been irregularly drawn up, and allowed the case to be placed at the bottom of the list, to give the parties an opportunity of arriving at some agreement as to the facts in dispute.

ATKINSON v. DEHNERT. July 5.

Declaration inconsistent with evidence—Amendment—Cost of witnesses—Practice.

Rule *nisi* to enter a verdict for the defendant.

The plaintiff recovered damages for injuries he had received through the negligence of a servant of the defendant. The declaration alleged that a servant of the defendant named Waldron was in charge of the defendant's dray, and that owing to his negligence the dray came into collision with the plaintiff's buggy, and the plaintiff was thrown out and injured. At the trial the jury found that Waldron was not in the defendant's employ, but in his son's, and that the injuries were caused through the negligence of a servant of the defendant's named Bruce.

DR. MADDEN and MR. MITCHELL, for the defendant, contended that as the declaration was not borne out by the evidence, the plaintiff could not recover, and that a verdict should be entered for the defendant.

MR. PURVES and MR. HODGES for the plaintiff, applied to amend the declaration by striking out Waldron's name, and leaving it generally that the accident was caused by the negligence of a servant of the defendant.

THE COURT held that the amendment should be allowed, and that the verdict should stand; but that the plaintiff should pay the costs of the rule, and also the costs of the witnesses called by the defendant exclusively to prove that Waldron was not his servant, and that the plaintiff should not be allowed the costs of the witnesses exclusively called by him to prove that Waldron was in the defendant's service.

Exparte TOBIAS. July 7.

The Fisheries Act 1873 (*No.* 473), *sec.* 34. *Taking fish of less weight than prescribed by law—Evidence.*

Order *nisi* to prohibit the justices of Melbourne from enforcing a conviction against one Reuben Tobias, by which he was fined for "taking" fish under weight. The evidence was to the effect that the market inspector found a basket of fish in the possession of a third person in which there was fish under weight. In the basket there was also an invoice purporting to be signed by Tobias, but beyond this there was no evidence that Tobias did "take" the fish, nor that the invoice was signed by him.

MR. TAYLOR moved the rule absolute. No cause was shown.

THE COURT held that there was no evidence to support the conviction, and made absolute the order to prohibit its being enforced.

July 8.

(Before their Honors Mr. Justice Williams and Mr. Justice Holroyd.)

FERRELL v. THE IMPERIAL FIRE INSURANCE COMPANY.

Common Law Procedure Statute 1865 (*No.* 274), *sec.* 266. *Matter referred to arbitration—Power of judge over costs of the award.*

Summons referred to Court.

MR. MACDERMOTT appeared for the plaintiff, in support of the summons; MR. HODGES, for the defendants, to show cause.

The action was brought against the defendant company to recover a sum due on a policy of fire insurance on some hay. The defendants offered £200. The plaintiff claimed £290. After the action was brought an application was made to a judge in Chambers to stay proceedings and to refer the dispute to arbitration, as provided by one of the conditions of the policy. The order was made, but no provision was made for the costs of the arbitration. The plaintiff then took out a summons to have an addition made to the order that the costs of the arbitration should depend on whether the

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plaintiff was awarded more or less than the sum offered to him by the company, and this summons was referred by Mr. Justice Higinbotham to be dealt with by the Court. It was contended for the defendants that under the 266th section of the Common Law Procedure Act, under which the reference to arbitration was made, the judge had no jurisdiction over the costs of the award.

THE COURT was of opinion that the judge had no power to make any provision for the costs and that the summons should be dismissed.

REG v. PERRY, *exparte* BROWN. July 8.

Licensing Act 1876 (*No.* 566), *sec.* 77—*Justice of the Peace Statute* 1865 (*No.* 267), *secs.* 117 *and* 123. *Justices convicting under sec.* 77 *of Licensing Act have no power to order, in default of payment, imprisonment for a definite time.*

Order *nisi* to quash a conviction made by the justices of Melbourne against one Louisa Brown, for refusing admittance to an officer of police. The conviction directed that if the defendant did not pay the fine the amount was to be recovered by distress, and in default of sufficient distress, the defendant should be imprisoned for four days.

MR. CHOMLEY showed cause; MR. HODGES and MR. M'INTYRE moved the rule absolute, and submitted that the justices had no power to make the order directing imprisonment for a definite time in default of payment. The Licensing Act provided no means for enforcing the penalty, and therefore under sections 117 and 123 of the Justices of the Peace Statute there must, in the first instance, be a warrant of distress issued, and if that warrant were returned unsatisfied the justice to whom it was returned, or some other justice, might direct imprisonment.

THE COURT held that the justices imposing the fine had no power to make the alternative order for imprisonment for a definite time, and quashed the conviction.

July 8.

REG. v. WALSH AND OTHERS, *exparte* PENDREIGH.

Licensing Act 1876 (*No.* 566), *secs.* 54 *and* 61. *Customs and Excise Act* 1862 (*No.* 147), *sec.* 143—*Person holding licence under the Customs and Excise Act* 1862, *and selling liquor contrary to his licence, can be convicted under sec.* 61 *of the Licensing Act* 1876.

Order *nisi* to prohibit the justices at Hawthorn from enforcing a conviction against one Adam Pendreigh for selling liquor in less quantities than he was authorised to do by his licence.

The defendant, Pendreigh, held a wholesale wine and spirit merchant's licence under sec. 143 of the Customs and Excise Act 1862, by which he was entitled to sell liquor in quantities of not less than two gallons. He was summoned and fined under sec. 61 of the Licensing Act 1876 for selling liquor contrary to his licence.

MR. CHOMLEY showed cause, and referred to *exparte Wylie*, and *exparte Butler* 4 A. L. T. 41.

MR. TAYLOR moved the rule absolute, and contended that defendant ought to have been summoned under sec. 54 of the Licensing Act 1876 for selling liquor without a licence, and not under sec. 61 of the Act for selling liquor otherwise than in the quantity and manner authorised by his licence, and submitted that the provisions of sec. 61 of the Licensing Act did not apply to persons holding licences under the Customs and Excise Act 1862.

THE COURT held that as the defendant had sold liquor in less quantities than he was authorised to do by the license issued to him under the Customs and Excise Act 1862, he could be prosecuted under the Licensing Act for selling liquor otherwise than he was entitled to do under his licence, and discharged the order.

O'SHANASSY v. LITTLEWOOD. July 9.

Contract for the sale of land—Misrepresentation as to area—Compensation—Pleading.

Demurrer to replication.

MR. WEBB, Q.C., and MR. HODGES for the defendant, in support of the demurrer; DR. MADDEN and MR. MITCHELL for the plaintiff, in support of the replication.

The plaintiff sued the defendant to recover damages for an alleged breach of contract. Plaintiff alleged that he had agreed to purchase from the defendant, and the defendant had agreed to sell to him, the Lower Moira station, consisting of 4,983 acres of freehold land, and 18,800 acres of land held under licence from the Crown under the Land Act, 1869, the price to be paid being £16,194. The contract of sale provided that no error or mistake should annul the contract, but that compensation should be given, to be decided upon by arbitrators. It was further stated that the defendant, instead of giving to the plaintiff 18,800 acres of land, held under licence, gave possession of only 13,000 acres; that the plaintiff was entitled to compensation for the difference; that the defendant had waived any claim to have the matters in dispute referred to arbitration, and the plaintiff therefore sued for the loss he had sustained by receiving only 13,000 acres instead of 18,800 acres. The defendant pleaded that by the conditions of the sale the plaintiff was to make any requisitions on the defendant's title within 10 days, and that after receiving the particulars of the defendant's title to the land he made no objection. The plaintiff replied that the defendant had produced a licence for the occupation of the land, and had represented that this licence was for 18,800 acres of land; that he knew the representation as to the area to be untrue; that the plaintiff was not aware of the extent of the property, but that he was induced by the representations of the defendant not to object to

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the title. The defendant demurred to the replication on the ground that it was for a different cause of action than that referred to in the declaration.

THE COURT held that the defendant's plea was bad, and was no answer to the action. That the conditions of the contract provided only that the plaintiff should be taken to accept the title of the defendant to the property, but did not deprive the plaintiff of his right to require compensation for any mistake made in the description of the property. The demurrer was therefore overruled and judgment given for the plaintiff.

July 10.

REG. v. HINTON, *exparte* M'MANUS.

Innkeeper and guest—Under what circumstances lien of innkeeper over guest's property may be defeated.

Rule *nisi* to quash an order made by the justices in Petty Sessions at Melbourne.

MR. HOOD moved the rule absoute; MR. TAYLOR showed cause.

Hinton summoned M'Manus for the illegal detention of several boxes of clothing. M'Manus was the proprietor of an hotel. Hinton went with his wife and family to reside at the hotel, and lived there for six weeks, being supplied with board and lodging during that time. He made an agreement with M'Manus to pay him at the rate of £2 per week. He did pay for two weeks, but at the end of the sixth week, according to Hinton, the landlord refused to supply him any further. There was then about £8 due to M'Manus, who claimed a lien on Hinton's property in the hotel, and Hinton took proceedings to compel delivery of the property to him. The justices made an order against M'Manus, and it was now sought to have it quashed, on the ground that the justices had no power to make it, as an innkeeper had a lien upon the goods for the amount of his debt.

MR. TAYLOR submitted that an innkeeper had a lien only in the case of a guest, but not where he made a special contract. The innkeeper was bound to supply all reasonable accommodation to a traveller, and if the guest did not pay him he could retain the goods of the guest till payment was made. But here the complainant was not a guest; he was merely a lodger, and a lodging-house keeper had no lien over the property of his boarders.

MR. HOOD submitted that this was not the case of a boarder, but the complainant had gone to the hotel and dealt with the landlord as an innkeeper, and not as a lodging-house keeper.

THE COURT was of opinion that there was evidence from which the justices might form the opinion that the complainant was not a guest at the hotel, and therefore the landlord had no lien upon the goods. The rule to quash the order of the justices was therefore discharged.

HALL v. WARBURTON. July 11.

Ejectment—Adverse possession—Inference to be drawn from fence extending across boundary—Misdirection.

Appeal from County Court, Melbourne.

MR. BRYANT for the appellants; MR. HOOD for the respondent.

The action was brought in the County Court to recover damages for trespass to land of the plaintiffs, and at the trial it was altered to an action of ejectment. The plaintiffs held a certificate of title for an allotment of land, including the portion in dispute. The defendant's mother owned an adjoining allotment, which she purchased a few years ago. There was a dispute as to the right to the possession of a small strip of ground on the boundaries of the two allotments, the plaintiffs claiming the ground under the certificate of title, and the defendant as under adverse possession for more than 15 years. Evidence was given for the plaintiffs to show that the defendant, or those through whom he claimed title, could not have been in exclusive possession of the property for the time stated, inasmuch as within the 15 years there had been a fence in existence over a portion of the property which marked the boundary between the two allotments. This fence was not continued the whole length of the boundary, but at the trial the judge told the jury that they might infer that it had been continued across the boundary between the two allotments. The jury gave a verdict for the plaintiffs, and the defendant appealed.

THE COURT held that the direction of the judge of the County Court was wrong, and allowed the appeal.

THOMPSON v. JAMES. July 11.

Mining Companies Act 1871 (*No.* 409), *sec.* 38—*Minute book of committee not a "book of account."*

Special case stated by justices at Sandhurst.

MR. HELM for appellant; MR. ISAACS for respondent.

The defendant was the manager of the South Devonshire Reef Company, and the complainant was a shareholder in the company. The defendant was summoned by the complainant for not allowing him to inspect the minute book of the committee. The justices fined the defendant 1s., and he appealed. The Mining Companies Act, No. 409, sec. 38, directed that "all books of account" should, during office hours, be open for the inspection of shareholders and creditors, and the question was whether this minute book was a book of account or not. It was contended by Mr. Isaacs that it was a book of account, as it contained entries of accounts presented by the manager for payment to creditors and passed by the committee.

THE COURT held that it was not a book of account, but only a minute book, and allowed the appeal.

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July 12.

BRUCE v. GARNETT, *re* REIDLE.

Instruments and Securities Statute (Bills of Sale) 1876 (*No.* 557), *sec.* 15—*Contract for letting and hiring—Real contract not put into writing*—Howse *v.* Glowry, 8 *V. L. R.* (*L.*) 280, *followed.*

Appeal from a decision of justices on an interpleader summons in an action of *Bruce v. Garnett.* The plaintiff obtained a judgment against the defendant and issued execution. Reidle claimed the goods seized in execution under a contract of letting and hiring. This contract was duly registered under Act No. 557, and recited that, in consideration of the sum of £385 then paid by Reidle to Garnett, the goods were sold to him by Garnett and that he then hired them to Garnett.

The facts were that Garnett at the time owed Reidle a sum of £307 on a bill of exchange, and Reidle threatened to sue for it. There was also a sum due for rent, which Reidle promised to pay if he obtained the goods. There was another account for £10 10s., which Reidle also promised to pay, and he gave Garnett £10 in cash, these sums altogether making up the £385 which purported to be the amount paid by Reidle. The plaintiff contended that this contract was bad, as it did not truly state the consideration for it. The justices, however, overruled the objection, and held that Reidle was entitled to the goods.

MR. HOOD for the appellant; MR. HELM for the respondent.

MR. JUSTICE WILLIAMS, in delivering the judgment of the Court, said the case seems clear. I am not prepared to say that I would carry the decision in the case of *Howse v. Glowry*, 8 V. L. R. (L.) 280, further than it has gone. Yet, so far as it has gone, I am not prepared to cast any doubt upon it. That case is decisive of the present one. The Act provided that the real contract shall be put in writing. In this contract was a statement of a consideration that did not take place. The cases of *Exparte Rolph*, 19 Ch. D. 98, and *Exparte Frith*, 19 Ch. D. 419, are also conclusive on the point. The appeal will be allowed and judgment given for the execution creditor.

July 14.

THE QUEEN v. THOMAS PHILPS, *exparte* THE GRANYA COMPANY.

Mining Statute 1865 (*No.* 291), *sec.* 101, *sub-sec.* (*vi.*)—*Contract within meaning of section—Jurisdiction of warden—Prohibition.*

Rule *nisi* for prohibition to restrain the warden at Wodonga from proceeding to enforce an order made against the Granya Company and others for payment of a sum of £30 to Thomas Philps. The Granya Company, which was registered as a no-liability company, held a claim adjoining the Maritana Company, which was not registered. The Maritana Company was divided into five shares, of which the Granya Company purchased two shares; but it was alleged by the Granya Company that it had never obtained possession of the ground, that the land was worked by the other partners, and that it had never received any of the gold raised from the mine. The complainant, Philps, sued the Granya Company and the three other owners of the Maritana mine to recover a sum claimed to be due to him for work done for the mine so far back as 1882. The warden made an order for payment of the amount claimed. It was sought to prohibit the enforcing of this order so far as the Granya Company was concerned, on the ground that the warden had no jurisdiction to make it.

SIR BRYAN O'LOGHLEN moved the rule absolute. MR. M'DERMOTT showed cause.

MR. JUSTICE WILLIAMS, in delivering the judgment of the Court, said that this was an application for a common law writ of prohibition to restrain the warden at Wodonga from further proceeding in a complaint against the Granya Company and three other parties. The company applied for the writ on several grounds, the first being that the warden had no jurisdiction to deal with the subject matter, as there was no "contract" within the meaning of section 101 of the Mining Statute 1865 between plaintiff and the defendant company. It was only necessary to deal with this ground. The Mining Statute 1865, section 101, gave jurisdiction to the warden to decide on all suits concerning or arising out of any contract respecting the working or using for mining purposes or otherwise in relation to mining on Crown lands, and concerning any money due in respect to such contract. The evidence relied upon by the complainant was this—that certain persons, five in number, held a mining tenement; two of these persons disposed of their interests to the Granya Company. The Granya Company having purchased these interests desired to enter into possession, but the other three owners would not allow them to enter into possession. Before the transfer to the company took place, and before the purchase by the company of the two-fifths share in the mining tenement, the complainant was employed by the five owners of the ground to do the work the payment for which he now claimed. These facts were not in dispute, and the only question was what was the proper conclusion of law to be drawn from those facts. It was contended for the complainant that the Granya Company had become partners in relation to the working of the Crown land, and as such was bound by the contract made with Philps before the transfer was made to it, and before it had entered into possession. The Court did not concur with that argument, and was of opinion that there was no contract so far as the Granya Campany was concerned, and that the rule for a prohibition should be made absolute so far as enforcing a judgment against it was concerned.

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SITTINGS IN EQUITY.

(Before their Honors the Chief Justice, Mr. Justice Higinbotham, and Mr. Justice Williams.)

MERRY V. THE QUEEN July 14.

Evidence—Necessary witnesses residing out of jurisdiction—Grant of commission to examine.

Appeal from an order of Mr. Justice Molesworth in chambers, refusing to grant an application made on behalf of the Queen and the Board of Land and Works to grant a commission to examine generally William Williams, John Badcock, and other witnesses residing in Great Britain.

MR. WEBB, Q.C., and MR. WORTHINGTON appeared for the Queen and the Board of Land and Works, in support of the appeal; MR. A'BECKETT for Mr. Alex. Fraser and Mr. Germain Nicholson, two of the defendants, also in support of the appeal; MR. HIGGINS for the plaintiff.

The suit was brought by Mr. W. R. Merry against the Queen, the Board of Land and Works, Messrs. Alex. Fraser, Germain Nicholson, and other persons interested in the contract made in 1858 with the Government for the construction of the railway between Geelong and Ballarat. The plaintiff was one of the original contractors for the construction of the line. Some disputes afterwards arose between the contractors and the Government, and an action was brought against the Government to recover a sum of about £500,000, on account of moneys retained by the Board of Land and Works and for work done, for which sufficient payment had not been made. In 1870, the action against the Government was compromised for the sum of £60,000, to be paid by the Crown to the parties interested. Mr. Merry alleges that this compromise was made without his sanction and against his protest, and the suit is brought to have it set aside, and an inquiry made as to what he is entitled to receive under the railway contract. In September last an order was made on the application of Messrs. Nicholson and Fraser, two of the defendants, who were parties to the compromise, and who were interested in the contract, that a commission should be granted to examine witnesses in England. The witness whose evidence it was chiefly sought to obtain was that of Mr. Wm. Williams, who was interested in the contract. This commission was to be returned in six months. The commission had not been returned to this country in April last, and an application was then made to Mr. Justice Molesworth for an order to extend the time for the return of the commission. His Honor refused that application. An application was then made on behalf of the Queen and the Board of Land and Works for a commission to take the evidence of Mr. J. B. Bennett and other witnesses residing in England; but His Honor granted the commission only to examine Mr. Bennett, and struck out the other witnesses. The defendants appealed against that order, on the ground that the evidence of Mr. Wm. Williams and Mr. Badcock was necessary to enable them to sustain their case at the trial, that the plaintiff had no interest in the contract, and that the compromise that had been arrived at was a fair one. The plaintiff contended that the application for the commission was intended only to defeat and delay him in the prosecution of the suit.

THE COURT was of opinion that the commission should be granted to examine Mr. Williams and Mr. Badcock, and therefore allowed the appeal, but directed that the appellants should pay the costs of appeal and of the commission in England, whatever might be the result of the suit.

(Before their Honors Mr. Justice Higinbotham and Mr. Justice Holroyd.)

THE QUEEN V. ROBINSON. July 15.

Obtaining money under false pretences—Unregistered person inducing others to bet with him by wearing badge of registered bookmaker—Admission of evidence.

At the March sittings of the Central Criminal Court one Wm. Robinson was tried with another person named Braham on a charge of obtaining £1 from one G. R. Vale by false pretences, and was convicted; but a special case was reserved by the Chief Justice on two questions of law that were raised at the trial. Braham was acquitted. The case as stated by the Chief Justice for the opinion of the Supreme Court in Banco was as follows:—"A witness, G. R. Vale, deposed, amongst other matters, that he had laid a wager of £1 on a horse race with the prisoner Robinson, another man being with him. He said that one of the two men, to the best of his belief Robinson, wore on his hat a badge like one produced. The witness was then asked, 'What did you understand from the badge?' He answered, 'I understood from the badge that the man wearing it was a registered bookmaker. I was induced to give him my money in consequence of his wearing this badge. I thought I could trust him as a registered person.' The question, 'What did you understand from the badge?' was objected to, and the objection was overruled. The money referred to by the witness was, as he previously stated, £1, the amount of a bet he had made with the prisoner Robinson, which he was induced to deposit with him in consequence of his wearing this badge. It was also proved that the Victoria Racing Club registered certain persons as being licensed to carry on the business of betting on the Flemington racecourse on being satisfied that such persons were fit and proper to be registered. A fee of £10 10s. per annum was charged for registration, and the badge produced had been issued to a registered person, but not to either of the prisoners. In order to prove that the prisoners were not registered persons a book was produced kept by the club, and containing the names of all registered persons. A witness, Edward Miles, was called, and deposed, among other things, 'I produce the minute book of the club. I keep it. I have searched this book

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and all the minutes. I have examined the minutes; they are all fair copied by me from rough notes made by me at the time. These minutes, when fair copied by me, are all signed by the chairman, the proper person, and were confirmed at the next meeting. I know his handwriting, and that the book is signed by him as chairman of the meetings. The names of all registered persons are entered in this book.' It was objected by the learned counsel for the prisoner that this book was not admissible to prove the negative that the prisoners were not authorised by the club. I overruled the objection, and the book was admitted. The prisoner Braham was discharged by me during the trial, and gave evidence for the other prisoner. The prisoner Robinson was found guilty, and admitted to bail, pending the decision of these points of law. I have to request the decision of their honors the judges as to whether I was right in my ruling."

MR. JUSTICE HIGINBOTHAM delivered the decision of the Court. He said—The decision in this case has stood over for the amendment of a verbal error in the case reserved. We think that the learned judge was right in overruling both the objections that were taken to evidence. The charge was for obtaining money by a false pretence. It was a necessary part of the proof in support of that charge not only that the prisoner Robinson had used the badge, knowing it to be a false pretence, but also that the prosecutor had been induced to give his money to the prisoner in consequence of being deceived by that pretence. If the prosecutor knew of the falsehood of the pretence, there could not be a conviction on this charge. The question, "What did you understand by the badge?" was therefore admissible, and was indeed the most proper form in which the inquiry could be made. We also think that the book containing the names of all registered persons was properly proved, and was admissible in evidence.

(Before His Honor Mr. Justice Molesworth.)

PAIN v. FLYNN. July 16.

Sale of land—Agreement to purchase on behalf of another person—Purchaser trustee for that other person.

MR. TOPP and MR. HAYES for the plaintiff; MR. HIGGINS for the defendant.

This suit was instituted by the plaintiff against the defendant to have it declared that the defendant was a trustee for him of some land. The plaintiff's father made a will by which he left certain property to the plaintiff and his sister, to be divided between them on the plaintiff coming of age. The plaintiff came of age in May, 1883. In June, 1883, some land belonging to the estate was offered for sale by the executor of the will. Plaintiff desired to purchase one lot, and, according to his case, he, before the sale, requested Flynn to purchase it for him, and that he agreed to do so. The lot was sold for £263 5s., and purchased in Flynn's name, a deposit of £10 being paid by Flynn. On July 7 an agreement was drawn up, by which Flynn undertook to convey the allotment to the plaintiff for the price he gave for it, but stipulating that a publichouse should not be built upon it. Flynn denied that he promised to purchase as agent for the plaintiff, but said that after the sale he agreed to let the plaintiff have the land for what he paid for it, but with a stipulation against a publichouse being built upon it. This agreement was not carried out, as plaintiff did not pay all the money.

HIS HONOR said that there was a great conflict of evidence, and he had some doubt of the truth of the plaintiff's case, but various people had stated that Flynn had told them that he had bought for the plaintiff. He therefore made a decree that the defendant should be considered a trustee of the land for the plaintiff, and should execute a conveyance of the same to the plaintiff free of incumbrances, such conveyance to be at the plaintiff's expense, the plaintiff to repay to defendant all purchase money paid by him and the expenses reasonably incurred in endeavoring to bring the land under the Transfer of Land Statute.

INSOLVENCY JURISDICTION.

(Before Mr. Justice Molesworth.)

Re E. T. CLAPHAM. July 4.

Insolvency Statute 1871 (*No*, 379), *sec.* 154, *sub-secs.* (*x.*) *and* (*xiii.*)—*Meaning of "document" within sub-sec.* (*x.*) (Re Walters, 3 *W. W. & A'B.*; 1 *E. & M.* 14 *followed.*)

This was an appeal from a decision of the judge of the Court of Insolvency, Melbourne, refusing a certificate of discharge to E. T. Clapham.

MR. A'BECKETT appeared for the appellant; MR. ISAACS for respondent.

HIS HONOR, in giving judgment, said:—This case comes before me on an appeal from an order made on the 21st day of May last by the learned judge, then acting in the Insolvent Court, Melbourne, refusing the certificate of Mr. Clapham. Clapham, in the saddlery business, had long dealings with the firm of Henry Box and Sons, supplying him with goods. Mr. George Hale Box, being dissatisfied with the extent of his indebtedness to the firm, called upon Clapham to furnish him with a statement of his assets and liabilities, which he did, I would say, shortly after July 31, 1882, to which date it contains entries. Insolvent also furnished another account supplemental to it, being a list of debts due to him in detail. The first ground for refusing the certificate was under the Act 379, section 154, sub-section x., because that "he was privy to the making of certain false entries in a certain document relating to his affairs, to wit, a balance-sheet showing his financial position with intent to conceal the state of his affairs." I entirely concur with the judge in the condemnation of this balance-sheet as erroneous to the

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extent of £600 and more (he fixes its date, I think erroneously, as July 11), and that it was wilfully untrue and done with the intent to conceal the state of his affairs, and to induce Box to continue to give him credit. But I do not think that a balance-sheet so headed to a particular creditor is a document within the section in question, which relates, I think, to account books generally respecting insolvent's affairs, to which his creditors generally should be able to resort for information or evidence in the proceedings in insolvency. All the previous subdivisions of the section point to matters connected with the insolvency jurisdiction; and so as to sub-sections xi. and xii. It is to be observed that a violation of the sub-section involves criminal responsibility, and a total deprivation of certificate. That, unless restricted as I have stated, it is most vague as to the character of the document, and without restriction as to motive for false entry, or intended or actual effect, or the time at which it was made. If it comes within the section, Clapham's false balance-sheet furnished to Box might be used by any creditors opposing his certificate in any future insolvency. The next ground for refusing the certificate is based on sub-section xiii. of the same section—"If within four months next before sequestration he by any false representation or other fraud has obtained any property on credit, and has not paid for the same," according to the order appealed from, "he unlawfully, knowingly, and designedly did falsely represent to the said opposing creditor that he was then in safe and solvent circumstances, by means of which false representations he did then unlawfully obtain credit of and from the said opposing creditors certain property—to wit, a large quantity of saddlery, &c.—which the insolvent has not paid for, with intent to defraud." I expressed my views upon the distinction of evidence and the necessary effect of statements on the minds of creditors in *re Walters*, 3 W. W. & A'B., 1. E. & M. 14, to which I adhere. The only evidence sent to me as to this of Box is "repeated conversations about his position always as insolvent." Box's evidence also stated assertions by insolvent that particular debts which had been really paid to him were unpaid, but that is not definitely set out or made ground of decision. In the reasons given by the judge he refers more to the balance-sheet as the false representation, but hardly any of the debt due to Box was contracted after it, though some of the words of the judge would indicate that he thought otherwise. In fact, almost all the debt to Box is referred to in the balance-sheet or accompanying document. Box seems to have selected one small debt for goods, £4 11s., about September 4th, 1882, as contracted after the balance-sheet. He has not given any particulars as to the effect on his mind of the balance-sheet or the date when it was produced, or as to the furnishing of those goods. Box says he learned the falsity of the balance-sheet by the examination of the insolvent after September 8th. The goods seem to have been delivered from time to time because of a general credit, though usually a security by note was given for each lot. It may be that if Box had learned the falsity of the balance-sheet before September 4th he would have stopped the delivery of the £4 11s. worth of goods. But I have nothing sufficiently clear about that. I allow the appeal from the refusal of the certificate. As to the dispensing with the payment of the 7s. in the pound, I confirm the decision of the learned judge in insolvency.

PROBATE JURISDICTION.
(Before Mr. Justice Molesworth.)

July 10.

IN THE ESTATE OF ELIZABETH ANN LEAHY.

Administration de bonis non—*Executor of administrator—The executor of an administrator is not entitled to administration* de bonis non.

MR. HOLDEN moved that administration *de bonis non* be granted to Edward William Lightfoot. The intestate died and her son Alfred Leahy was appointed administrator. He died before he had administered all the property, and the present applicant applied as the executor of the administrator Alfred Leahy.

HIS HONOR held that the executor of an administor was not entitled to a grant of administration, *de bonis non*, and that the next-of-kin of the intestate were the proper persons to apply.

Lynch and *M'Donald* proctors for the applicant.

July 10.

IN THE WILL AND CODICIL OF MARY BOUNDY.

Married woman—Affidavit as to separate estate.

The testatrix was a married woman. The affidavit as to separate estate stated that she acquired the real estate in 1878, and that the personal property consisted of furniture and mining shares, partly given to her by friends and partly acquired by her out of the rents and profits of the real estate.

MR. FORLONGE moved for probate to the executors.

HIS HONOR stated that he would require a fresh affidavit, setting forth with more particularity how and at what dates the testatrix acquired the personal property.

Mr. Hurry proctor for the executors.

July 10.

IN THE ESTATE OF JAMES HALL CRAB.

Administration—Applicant described as "brother-in-law" of intestate.

MR. WOOLF moved that letters of administration be granted to John Gelland. The affidavit stated that the intestate had left a widow and seven infant children, that the widow consented to

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administration being granted to the applicant, and that the applicant was the "brother-in-law" of the intestate. The relationship existing between the applicant and the widow was not shown. His Honor held that the materials were insufficient, and stated that he would require a fresh affidavit showing the relationship existing between the applicant and the widow, so as to enable the Court to determine whether the applicant was the person next entitled to take out administration after the widow.

Proctor for the applicant, *Mr. Maddock.*

July 17.

IN THE WILL OF M'GREGOR.

Wills' Statute 1864 (*No.* 222), *Sec.* 8—*Signature of testator in attestation clause—Practice.*

The testator signed his name in the attestation clause. The affidavit of one of the attesting witnesses merely stated that the testator had so signed.

MR. DUFFY moved for probate to the executors.

HIS HONOR refused the application, and stated that it was his practice in such cases to require an affidavit from one of the attesting witnesses setting forth the circumstances under which the will was signed, and the conclusions arrived at by the witness as to whether the testator, by so signing, meant to execute his will.

Proctors, *Lynch* and *M'Donald.*

July 17.

IN THE WILL OF VAUGHAN.

Probate—Name of witness improperly spelt—Practice.

MR. MOULE moved for probate to the executors.

The name of one of the attesting witnesses to the will was stated in the affidavit to be "Rowlands." He signed his name to the will as "Rowlds," but no notice was taken of the discrepancy in the affidavit.

HIS HONOR stated that he would require an affidavit stating why the witness had so signed.

Proctor, *Mr. Sims.*

July 24.

IN THE WILL AND CODICIL OF RAE.

Will—Codicil signed by mark—Affidavit—Practice.

The testator had signed the codicil by affixing his mark. The affidavit stated that the reason for his so doing was because he was too ill to sign his name, but did not state that the codicil was read by the testator or to him before signing.

DR. M'INERNEY moved for probate to the executor.

HIS HONOR refused the application, and said a man may, of course, be able to read when he is not able to write. I will require a fresh affidavit, stating whether the testator was able to read or not, and also, whether he did, in fact, read the codicil or had it read to him.

Proctor for the applicant, *Atkyns.*

IN THE ESTATE OF LUCY BROWN. July 24.

Administration—Caveat—Withdrawal of caveat—Costs.

The intestate left two daughters as her only next-of-kin. The younger daughter inserted her notice of intention to apply for letters of administration. The elder one afterwards inserted a similar notice. Each daughter entered a caveat to the other's application. The younger daughter is a married woman, and lives out of the jurisdiction. The elder one is unmarried, and lives within the jurisdiction. The younger one withdrew her caveat at the last moment.

MR. WOOLF moved for letters of administration to the elder daughter, and asked for costs (*Re Downey*, 5. V. L. R. (I.) 72).

An affidavit had been filed stating that no other caveat had been lodged in accordance with (*In the Will of Lansell*, 7. V. L. R. (I.) 22).

HIS HONOR granted the application, with liberty to charge the costs occasioned by the caveat against the share of the caveator.

Proctor for the applicant, *O'Hea.*

IN THE ESTATE OF MARY M'IVOR. July 24.

Administration de bonis non *granted to executor of administrator where next-of-kin consent.*

DR. M'INERNEY moved for letters of administration *de bonis non* to the executor of the husband of the intestate. On the wife's death the husband took out letters of administration, but died before he had fully administered. He appointed the present applicant one of the executors to his will, and the guardian of his children. The only relative of the intestate's in the colony was her grandmother, who consented to the application.

HIS HONOR granted the application.

Proctor for the applicant, *Moloney.*

IN THE WILL OF CHELLEW. July 24.

Will—Executor according to the tenor—Word "trustee" used instead of "executor."

The testator gave, devised, and bequeathed all his real and personal estate, whatsoever and wherever situated unto Wm. Davey to hold the same unto the said Wm. Davey and his heirs, according to the nature and tenor thereof respectively upon certain trusts. Davey was referred to as trustee all through the will. The term executor was not used.

MR. TOPP applied that administration with the will annexed be granted to Davey, or that probate

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should be granted to him as executor, according to the tenor.

His Honor stated that he thought this was a case in which the testator had used the word "trustee" instead of the word "executor," and granted probate to the applicant as executor according to the tenor.

Sittings in Equity.

(Before His Honor Mr. Justice Molesworth.)

Cohen v. Lintz. July 21.

Insolvency Statute 1871 (*No.* 379), *Sec.* 70. *Gift by husband to wife within two years of insolvency a settlement within the meaning of the section, and void as against the trustee of the husband's estate.*

This suit was brought by the plaintiff as trustee of the estate of one Lintz, an insolvent, seeking to have it declared that he was entitled to a sum of £1000 given by Lintz to the defendant, his wife, within two years of the insolvency, or that he was entitled to obtain possession of some real estate purchased by the defendant in her own name with the £1000, and for which she had obtained a certificate of title. The plaintiff sought to set aside the gift of this money as being a "settlement" made within two years of the insolvency contrary to the provisions of sec. 70, Act No. 379.

Mr. Higgins for the plaintiff; Mr. Fullerton and Mr. Kelleher, for the defendant, contended that sec. 70 did not apply to a gift of a sum of money made under the circumstances, and also that the defendant had given valuable consideration for the gift, inasmuch as she had nursed her husband when he was ill, and he had promised, in consideration of her doing so, to make her a present when he received some money he expected.

His Honor, in giving judgment, said: One George Lintz was married to the defendant in 1866. They had both traded as hawkers and in other industries before marriage, and continued so afterwards, but living together, having their funds in common, supporting themselves and her two children. Lintz had often to go to hospitals, and during these times the defendant alone supported herself and her children. Lintz had expectations of succeeding to property from his father, and made promises to the defendant that when he did he would make some provision for her out of it. This expectation of property from the father was realised in February, 1882, and Lintz received about £5,500, and according to his promise gave the defendant £1000 of it for herself. The matter was perfectly fair and honest, in no sense a fraud upon anybody; and having the balance in his own hands he was then perfectly solvent, and the defendant gave a meritorious but not valuable consideration for this gift. The defendant treated the money as hers, and laid out portions of it in the purchase of real estate and obtained certificates of title in her own name; Lintz, partly by trading unsuccessfully, partly by waste, lost most of the residue of his property, and his estate was compulsorily sequestrated for the benefit of his creditors in January, 1883, within two years of the gift to his wife. The plaintiff, was appointed trustee of that estate under the Act 379, and by this bill seeks to set aside the gift of £1000 as void against him, and to establish his right to the real estate, as representing portions of that sum. I think that this gift of £1000 comes under the word "settlement" of property in the Act 379, section 70, defined at its end to be "any conveyance or transfer of property;" that it does not come under any of the exceptions to the first words, and that the trustee has a right to follow it into its investments. I declare that the gift of £1000 in the bill mentioned to the defendant, is void against the plaintiff, as trustee of the insolvent estate of the said George Lintz, and that the said defendant should be deemed to hold the several parcels of land in the bill mentioned purchased by the said £1000 as trustee for the said plaintiff, as such trustee for the said insolvent estate, and order the said defendant forthwith to do such acts and execute such instruments and conveyances at the plaintiff's expense as may be necessary to convey all her right, title, and interest in the said lands to the said plaintiff, and direct the said defendant forthwith to give up possession to the plaintiff of all such parts of the said lands as are in her possession or control.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

Priestly v. Davis. July 8.

Judicature Act, 1883 (*No.* 761), *Sec.* 59—*Appendix A., Part I., No.* 5—*Writ to be served out of jurisdiction—Practice.*

His Honor stated that where a party wished to issue a writ of summons to be served on a British subject out of the jurisdiction, the proper method is to apply to the judge before the writ is issued, who will insert the number of days allowed for appearance in the original and the copy, and will initial both documents. The copy ought then to be lodged with the Prothonotary.

Solicitors for the plaintiff, *Bennett, Attenborough, Wilks*, and *Nunn*.

Hayle v. Hayle.

Petition for divorce by husband against wife—Application for costs of wife, de die in diem, *and for costs of trial—Form of order.*

Application that the wife the respondent in a divorce suit should be allowed her costs *de die in diem*, and that a sum of money should be fixed for her costs at the trial. The petitioner filed an affidavit showing that he had no means, and it was contended on the authority of *Batch v. Batch*,

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5. V. L. R. (I.) P. & M. Cas. 120) the application ought not to be granted.

His Honor ordered the petitioner to pay the costs of the respondent *de die in diem*, such costs to be paid within five days after taxation, and that the petitioner should, within one month of the application pay the sum of £25 into court to meet the costs of the respondent at the trial.

Solicitors: For respondent, *Gillott* and *Snowden*; for petitioner, *O'Hea*.

July 9.

London Discount Bank v. Prendergast.

Rules of Supreme Court 1884, *Order XXXVIII.*, *Rules* 23 *and* 24—*Document referred to by affidavit ought not to be annexed to affidavit or referred to as annexed—Practice.*

An application was made for leave to defend an action on a Bill of Exchange under the Instruments and Securities Statute. The copy of the writ of summons served on the defendant was annexed to the affidavit made by him on his request for leave to defend as annexed, and referred to in the affidavit.

His Honor held that Order XXXVIII., Rule 23, of the Rules of the Supreme Court 1884 applied to applications under the Instruments and Securities Statute, and that the copy of the writ of summons should not be annexed to the affidavit or referred to in the affidavit as annexed, but must be referred to as an exhibit, and as such must be certified to by the commissioner before whom the affidavit is sworn under rule 24 of the same order.

Austin v. Mackinnon and Others. July 21.

Commission to examine witnesses—Commission not proceeded with—Taxation of costs—Review of taxation.

This was a summons on behalf of the defendant for a review of the taxation of costs. The plaintiff sued the defendant for an alleged libel in reference to the sale of some pictures of the plaintiff's. A commission was taken out by the plaintiff in April, 1883, to examine certain witnesses in Great Britain, with regard to the value of the pictures. This commission, of which the plaintiff had the carriage, and in which the defendant joined, did not reach London until August 23; it being returnable in Melbourne on October 10. No meeting of the commissioners was held. The plaintiff did not proceed with the action, and judgment was signed for the defendants. On the defendant's costs being taxed, the taxing officer disallowed certain costs that had been incurred by the London agents of the defendant's between the 21st and 31st August, 1883, on the ground that they had been prematurely incurred. He also disallowed other costs claimed in relation to the briefing of a second counsel for the defendants on the commission.

Mr. Hamilton for the defendants; Mr. Hodges for the plaintiff.

His Honor said: The charges that have been disallowed were for work done by the London agents of the defendant's between the 21st and 31st August, in preparing for anticipated meetings of the commission and examination and cross-examination of witnesses. These preparations are not, in my opinion, open to the objection of being premature at that advanced stage of the life of the commission, and after the long unexplained delay of the plaintiff, from April to August, in forwarding the commission to London. I am not prepared to lay down a general rule that a party who has joined a commission is not justified in making preparations to take part in fulfilling the object of the commission, and in incurring costs payable between party and party, until he has received notice, through the commissioner, of an appointment for the examination of witnesses. Such a rule would offer direct encouragement to applications for commissions not *bona fide*, but only for the purposes of delay. In the absence of such a general rules the London agents of the defendants were justified, in my opinion, in not delaying one hour after the arrival of the commission to take whatever steps might be necessary and proper as between the plaintiff and defendants to support the defendants' case before the commissioners. The summons will be allowed in respect to the items which have been disallowed by the taxing officer, solely on the ground that the work was done prematurely. Other items have been disallowed on the ground that they could not be allowed in any event, because they represent charges made for a second counsel. This is a matter within the discretion of the taxing officer, and he has, in my opinion, exercised his discretion properly. The summons as to this part will be disallowed. There will be no costs of this application.

July 21.

Ettershank and Others v. Russell and Others.

Judicature Act 1883 (*No.* 761), *Sec.* 8, *sub-sec.* 5, *Order LXV.*, *Rule* 27, *sub-sec.* 12—*Action under old procedure—Cross-action under new procedure—Cross-action stayed and liberty given to set up equitable facts by way of counter-claim—Costs occasioned by cross-action—Allowance to solicitor.*

This action was for the balance of a banker's account, and was commenced before the coming into operation of the Judicature Act; a cross-action on the same subject matter was commenced by the defendants against the plaintiffs under the Act.

Mr. Higgins, for the defendants, applied under sec. 8, sub-sec. 5 of the Judicature Act, to be allowed to set up, by way of counter-claim, equitable facts entitling the defendants to a stay of proceedings, and stated that if the defendants were allowed to put in their counter-claim they would abandon their cross-action (*Garbutt v. Fawcus*, 1 C. D. 155).

For the plaintiffs it was contended that this

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application should have been made to the Full Court, but if it was properly brought, the costs occasioned by the cross-action should be borne by the defendants, *Michael v. Corner*, W.N. (1875), p. 228. An application was made under Order LXV, Rule 27, sub-sec. 12 for remuneration of the plaintiff's solicitor, who had attended to the matter himself without counsel.

His Honor ordered that the action be carried on according to the ordinary course of the Court, under the Act 47 Vict., No 761, and that the defendants be at liberty to set up equitable facts in this action by way of counter-claim, and that the defendant have one week from the date of the order to deliver his counter-claim. The cost of the cross-action to be taxed and paid by the defendants to the plaintiffs. The cost of the application and of the order to be costs in the action. His Honor certified for counsel on behalf of the defendants, and allowed a fee of three guineas to the plaintiff's solicitor in respect to his attendance.

Solicitors: For the plaintiffs, *G. H. Taylor*; for the defendants, *Crisp, Lewis*, and *Hedderwick*.

Langton v. Gillespie. July 23.

After commencement of action new procedure ordered to be adopted on affidavit of counter-claim.

This was an action for goods sold and delivered. The action was commenced before, and the declaration was delivered after, the coming into operation of the Judicature Act, 1883. Subsequently a writ of summons was taken out by the defendant calling upon the plaintiff to show cause why all further proceedings in the cause, if any, should not be continued and concluded under the provisions of the Act.

The affidavit of the defendant stated that the plaintiff had contracted to deliver a much greater quantity of goods than those sued for, that there was a cross claim for damages for the breach of the contract, and that under the Judicature Act this cross claim could be set off against the claim of the plaintiff (*Atkinson v. Ellison*, W. N. (1875), p. 199; *Norton Cannock Coal Co. v. Merriman, ib.* p. 219).

His Honor said that the affidavit did not state the counter-claim very clearly, but directed that the action should be proceeded with under the ordinary proceedings under the Judicature Act. The costs of the application to be costs in the cause. The defendant to have six days in which to deliver his counter-claim.

Solicitors: For the plaintiff, *Bennett, Attenborough, Wilks*, and *Nunn*; for the defendant, *Crisp, Lewis*, and *Hedderwick*.

July 26.

Bradshaw v. Victorian Railway Commissioners.

Judicature Act, 1883 (*No.* 761), *sec.* 9, *sub-sec.* 11.

Action for negligence under old procedure—Report of medical men—Privilege—Costs.

Plaintiff, who had been injured in a railway accident, was examined by three medical men on behalf of the defendants. It was sought to compel the defendants to allow the plaintiff to inspect the report sent in by these gentlemen. The action was commenced under the old procedure.

Mr. Hood, for the plaintiff: This is not a new practice. The new rules go further than the old, and adhere to the equity practice as to inspection of documents (*Anderson v. Bank of British Columbia*, 2 C. D. 644). If the defendants, without consulting their solicitor, choose to employ a medical man to examine the plaintiff, that report is not privileged. These reports are generally considered confidential, but erroneously so in the case of a railway company (*Farquharson v. Great Northern Ry. Co.*, S. G. R., January, 1875, p. 280). There is no doubt that this is a matter for the discretion of the judge.

The Crown Solicitor opposed the application on the ground that the report was privileged.

His Honor referred to the following cases:—*Bustros v. White*, 1. Q. B. D. 423; *Skinner v. Great Northern Ry. Co.*, L. R. 9. Ex. 298; *Cossey v. London, Brighton, and South Coast Ry. Co.*, L. R. 5 C. P. 146; *Woolley v. North London Ry. Co.*, L. R. 4 C. P. 602; and said: I think that this report would be privileged under the old procedure. As this is a pending cause to be dealt with according to the procedure existing at the time it was commenced, it follows that this application cannot be granted. I dismiss the summons with costs.

Summons dismissed with costs.

Malpas v. Malpas. July 28.

Divorce—Suit not in issue—Commission to examine witness granted if circumstances require—Divorce Rules (Reg. Gen. 18th Sept., 1861).

Summons for a commission to examine a married woman named Samson, who was alleged to be *enceinte*.

Mr. Neighbour appeared in support of the summons.

Mr. Topp appeared to oppose. The suit is not in issue, and, therefore, a judge has no power to make the order asked for. For a suit to be in issue, twenty clear days must elapse from the filing of the answer or last pleading (Reg. Gen., 18th Sept. 1861, Rule 18). The examination of witnesses cannot be had before issue joined (*Mondell v. Steel*, 8 M. & W. 300; *Finney v. Beesley*, 20 L. J. Q. B. 395).

His Honor: The practice as to the examination of witnesses before issue joined is relaxed if circumstances require (*Shaw v. Shaw*, 31 L. J. P. & M. 95). Circumstances of special urgency require the order to be made in this case. Every day the witness is less able to be examined. I order the commission to issue. Costs to be costs in the suit.

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IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

BELCHER v. BELCHER. July 25.

Divorce — Paragraph in petition alleging that respondent was guilty of "incest" before marriage struck out as scandalous and irrelevant—Time for filing answer expired—Further time allowed—Reg. Gen., 18th Sept., 1861, Rules 2, 19, 55.

This was a summons by the wife, the respondent in a divorce suit, calling upon the husband, the petitioner, to show cause why a certain paragraph of the petition should not be struck out, and why further time should not be allowed the respondent for answering the petition. The sixth paragraph of the petition stated that the respondent had had a child before marriage. The seventh paragraph stated that she had been guilty of incest with her brother two years before marriage. And the eighth paragraph stated "that these matters, *i.e.*, the matters contained in the sixth and seventh paragraphs, so seriously affected the petitioner's health, etc."

MR. TOPP, for the respondent: The seventh paragraph of the petition states that the respondent had been guilty of incest with her brother two years before her marriage with the petitioner. This paragraph ought to be struck out as scandalous and irrelevant. A man, by marrying a woman, condones anything she may have done before marriage. The respondent has allowed her time for answering the petition to go by, but a judge has power under rule 19 to allow her to file her answer after the time has expired.

MR. M'KEAN, for the petitioner, submitted that the paragraph was relevant. Rule 2 specifies various statements which are to be made in a petition. These statements are to be made so as to enable the Court to be seised of all the facts in the case. It is necessary to insert this paragraph in the petition as showing the immoral character and tendencies of the respondent. Whether this paragraph is properly inserted or not, the respondent cannot now object to the petition as she has allowed the time for answering to go by (*Lidstone v. Lidstone*, 32 L. J. P. & M. 66; *Burrell v. Burrell*, 32 L. J. P. & M. 136).

MR. TOPP, in reply, submitted that under rule 55 the judge has power to amend the petition as may be necessary for determining the real issues between the parties.

HIS HONOR ordered that the petition be amended by striking out paragraph seven, and that the petitioner be at liberty, if he think fit, to amend the first part of paragraph eight of the petition by substituting for the words, "that these matters," the following words, "that this matter," and a further circumstance connected with the life of the respondent previous to marriage, and which came to the knowledge of the petitioner while the respondent was residing at —— aforesaid. The petitioner to have forty-eight hours to amend, if he so elect, and respondent to have a further period of forty-eight hours to put in her answer. The costs of the application to be costs in the suit. I certify for counsel.

Proctors: For the petitioner, *M'Kean* and *Leonard*; for the respondent, *Blake* and *Riggall*.

——— July 31.

DESAILLY AND ANOTHER v. HAM AND OTHERS.

Order XIX., Rules 4, 5, 6, 7. Appendix C., sec. VI., No. 14. Fraudulent representation—Statement of claim—Particulars—Pleading.

Action for fraudulent representation.

The statement of claim was that the defendants fraudulently represented to the plaintiffs that certain land was "of a certain value," knowing the same to be untrue, and that the plaintiffs were induced to lend money on such representation and thereby suffered damage.

The defendants took out a summons under Order XIX., Rule 7, for a further and better statement of claim.

MR. TAYLOR, in support of the summons: The words "of a certain value" are not sufficient; the claim should state what value the land was represented to be worth. See Appendix C., sec. VI., Forms 13 and 14. These forms are to be used (Order XIX., Rule 5).

MR. WOODFALL, to oppose: There is nothing in the statement that the defendants cannot traverse. If we put in the particulars asked for we would be stultifying Order XIX., Rule 4, by pleading evidence. The defendants can deliver interrogatories (Order XXXI., Rule 1).

HIS HONOR: In an action for fraudulent representation the precise nature of the alleged representation is a material fact which should not be omitted from the statement of claim. Even if it were not included in the form of claim in Appendix C., sec VI., No. 14, the defendant would be entitled in an action of this nature to particulars, and he might be entitled to special particulars beyond those contained in the forms if it should appear to be necessary. See Order XIX., Rule 6. The summons will be allowed with costs. I certify for counsel.

Solicitors: For plaintiffs, *Klingender*, *Charsley*, and *Dickson*; for defendant, *G. H. Taylor*.

——— July 31.

REG v. LITTLETON, *Exparte* KIRK.

Justice of the Peace (Prohibition) 1877, (No. 571), sec. 4. Pounds' Act, 1874, (No. 478), ss. 14, 19, 28, 29—Grounds for quashing an order of justices —When notice in writing under sec. 28 of Pounds' Act necessary—Particular nature of the illegality under secs. 14 or 19 of Pounds' Act need not be set forth in order made under sec. 29—Words necessary to give justices jurisdiction to make an order under sec. 29 of Act—Discretion of judge under Act No. 571 to grant an order to quash or to prohibit.

Application for order *nisi* under sec. 4, Act No. 571, to quash an order made by justices.

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MR. LEON, for the applicant: The grounds on which the rule is asked for are (1.) That the order is bad on its face; (2.) That the order ought not in law to have been made; (3.) That the justices had no jurisdiction to make such an order. The complainant proceeded under secs. 28 and 29 of the Pounds' Act, 1874 (No. 478). The order set out that the magistrates found that the defendant "did illegally impound the cattle of Louis Lange," and ordered him to pay damages and costs. The order should not only have set out the fact that the defendant illegally impounded "under this Act," but should have gone on to allege what particular prescription of the Pounds' Act had been violated, *e.g.*, those contained in sec. 14. or sec. 19. Illegal impounding is a neglect to comply with the provisions of the Pounds' Act (*Degraves v. Bennett*, 2 W. & W. (L.) 191; *Rowe v. Middleton*, 2 V. R. (L.) 59; *O'Keefe v. Behan*, 2 V. R. (L.) 16). This view is borne out by the fact that the exemptions in sec. 14 should be proved by complainant (*Mack v Murray*, 5 V. L. R. (L.) 416). There was no proof that notice of intention to complain had been lodged with the poundkeeper (*Reg. v. Taylor*, 8 V. L. R. (L.) 149), nor did it appear that such notice had been given simultaneously with releasing the cattle (*Parker v. Kelly*, 4 W. W. & A'B (L.) 28). The order should have described the cattle as being without the cattle excepted by sec. 14.

HIS HONOR said: This is an order under Act No. 571, to quash an order of justices awarding damages and costs to the owner of cattle illegally impounded under section 29 of the Pounds' Act, 1874. Some objections which cannot, in my opinion, be sustained, were taken to the order of the justices An order cannot be quashed under section 4 unless it be shown that the justices had no jurisdiction, or exceeded their jurisdiction, or unless the order is bad on its face, or ought not in law to have been made. The erroneous admission of evidence by the justices, or an alleged deficiency of proof is not a ground for quashing an order. As the complaint was lodged against the impounder, it was not necessary, in my opinion, that strict proof of the notice in writing to the poundkeeper under section 28 should be given. By neglecting to give the notice the complainant only deprived himself of the right to claim from the poundkeeper the trespass rates paid to and retained by him (*Stephen v. Gill*, 3 V. L. R. (L.) p. 178). It is only in proceedings against the poundkeeper for the illegal detention of the cattle impounded, that it has been held necessary under the present act to give such proof of notice (*Reg. v. Taylor, exparte Hailes*, 8 V. L. R. (L.), p. 149). It is not one of the objections taken in this case that the complaint has not been made within 10 days after notice. Neither is it necessary that the particular nature of the illegality under sections 14 or 19 of the Act should be set forth in the order made under section 29. The order is valid and sufficient, according to section 113 of the Justices of Peace Statute, 1865, if the subject matter is set forth in the words of the Act on which the order is framed. But this order does not do so. It alleges that "the defendant did illegally impound eight head of cattle," without adding the words "contrary to the provisions of the Pounds' Act, 1874." These words are necessary to give jurisdiction to the justices to make an order under section 29. Upon this ground alone, which is purely a formal ground, the applicant is entitled to relief. Relief against such an error of form will be afforded under the Act No. 571, either by an order to prohibit as for an error or mistake on the part of the justices, or by an order to quash. But in the former case the justices will have notice of the application as they ought to have in all cases where they have power to amend an erroneous order under Act 565, s. 17, and it will be the duty of the Court upon the return of the order *nisi* to amend the justices order if it be amendable. I think that a judge has a discretion to grant the one kind of relief or the other under Act 571, and that he ought, in the exercise of his discretion, to grant that relief which will not disturb the adjudication of the justices, while it corrects their mistake. I refuse to make an order to quash, but the applicant may, if he think fit, take an order to prohibit on the ground that the order of justices is erroneous in form.

Solicitor for the applicant, *Pyman*.

FOREMAN v. GILL. August 2.

Landlord and Tenant—Condition in lease against assigning without consent of landlord—Cheque given by tenant to landlord to obtain consent to an assignment—Want of consideration—Affidavit insufficient as to want of consideration—Presumption from gift of cheque.

Application for leave to appear and defend an action brought under the Instruments and Securities Statute, 1864, on a cheque for £20, drawn by the defendant in favor of the plaintiff or bearer.

The facts sufficiently appear from the judgment.

HIS HONOR, after stating the nature of the application, said: It appears by the defendant's affidavit that he gave the cheque to the plaintiff, who demanded it, as the condition on which she would consent to the transfer to an assign of the lease of a publichouse held by the defendant from the plaintiff, by assignment from the tenant. The lease contained a covenant binding, as it seems to be admitted, on the defendant against assignment without a previous license in writing of the plaintiff, coupled with the provision that such license or consent should not be withheld by the plaintiff in respect of any respectable and responsible assignee, tenant, or sub-lessee. The defendant denies that he received consideration for the cheque, but his affidavit is not satisfactory to me upon that point. The argument on his behalf is, that the plaintiff arbitrarily withheld

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her consent, and that he is therefore discharged from his obligation not to assign without her consent in accordance with the construction put upon similar words in leases in *Treloar v. Bigge*, L. R. 9 Ex. 151; and *Sear v. House, Property, and Investment Society*, 16 C. D. 387. Whether that be so or not will depend upon the precise language of the covenant and the provisions in this lease, which are somewhat vaguely described and are not quoted in the defendant's affidavit. But assuming that such is the effect of the terms of the lease, I have not the means of determining whether the plaintiff has arbitrarily withheld her consent to an assignment to a respectable and responsible assignee. The defendant's statement to that effect is not sufficient, for it is contradicted by his act of giving the cheque. He was not and could not be compelled to give the cheque. If his view of the plaintiff's conduct be correct, he might have assigned the lease, and have compelled the assignee to accept the assignment without the plaintiff's consent, and in that case the plaintiff's arbitrary refusal would have been an answer to any proceedings which might be taken by the plaintiff against the defendant. His giving the cheque in order to obtain the plaintiff's consent goes to show that the respectability and responsibility of the assignee may have been a matter open to reasonable doubt between the parties, and that the plaintiff waived her right to object in consideration of this sum of money. In that case there would be a good consideration for the cheque. The defendant can have leave to appear only on paying into Court the sum endorsed on the writ.

Solicitors for the defendant, *Braham* and *Pirani*.

MERRY v. REG. AND OTHERS. August 2.

Commission to examine witnesses—Application previously refused by another judge.

Some of the defendants obtained a commission for the examination of witnesses on the 15th October, 1883. This commission expired on the 15th April, 1884. Before the expiration these defendants applied to Mr. Justice Molesworth for an extension of the commission, which application was refused on the grounds of delay. Other of the defendants then applied for a fresh commission to examine certain witnesses, which Mr. Justice Moleworth refused, but this decision was reversed on appeal to the Full Court. On the expiration of the first commission, the commissioner, acting on the supposition that an extension had been granted, examined certain witnesses.

The defendants who had obtained the first commission now applied to have that commission extended.

A preliminary objection was taken on behalf of the plaintiff that, as this matter had previously been adjudicated on by a judge, a judge in Chambers had no power to review his decision.

It was contended on behalf of the defendants that section 4 of the Statute of Evidence, 1864 (No. 197), gave the judge jurisdiction to extend the commission (*Lord v. Lee*, 37 L. J. Q. B. 121; *Biddulph v. Camoys*, 9 Beav. 155).

HIS HONOR, after stating the facts, said: This is virtually an appeal from Mr. Justice Molesworth's first decision. I dismiss the summons with costs, on the grounds that it is virtually an appeal from the considered judgment of another judge.

Solicitors: For the plaintiff, *Budd*; for the defendants, *Crisp*, *Lewis* and *Hedderwick*.

MAIN v. DONALD. August 6.

Security for costs—A party recently released from prison who is in destitute circumstances, and who brings an action for his own benefit is not liable to give security for costs provided that he permanently resides within the jurisdiction of the Court.

Application for security for costs by defendant against plaintiff.

The facts sufficiently appear from the judgment.

HIS HONOR said: This is a peculiar case. The defendant, who is assistant superintendant of Pentridge Stockade, and is sued for a penalty of £100 for an alleged breach of his duty as an officer having the custody of prisoners under 31 Car. II., ch. II., sec. 5, applies for an order requiring the plaintiff to give security for the defendant's costs. The plaintiff has recently been released from the Stockade, and he is, according to the defendant's affidavit, in destitute circumstances. Neither of these facts is a warrant for the application. It has been held that a person who is undergoing sentence in prison is bound to give security for costs, but that is because he could not be reached by the process of the Court in the event of judgment being given against him. But now that imprisonment for debt on Supreme Court final process is abolished, the reason of that decision no longer exists. A pauper or an insolvent is not liable to give security unless he is suing as the nominee, or for the benefit of a third party. The plaintiff in this case was not in prison when the action commenced, and he appears to be prosecuting the action for his own benefit. The case comes, therefore, within the general rule that every person who is not inaccessible to the process of the Court by reason of his permanent residence abroad, or who is not in insolvent circumstances, and suing for the benefit of a third person, is at liberty to bring an action without giving security for costs. This general rule has not been altered by the new Rules of Procedure. I dismiss the summons with costs.

Solicitors: For plaintiff, *Scott*; for defendant, *Crown Solicitor*.

Exparte SLACK. August 7.

Licensing Act, 1876 (*No.* 566), *secs.* 38 and 40—*Successful objections taken by police inspector to the issuing of a publican's licence*—Mandamus

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discharged, and costs of police inspector ordered to be paid to Crown Solicitor—Right of inspector to costs—Right of Crown Solicitor to receive such costs.

Summons for review of taxation.

The facts and arguments sufficiently appear from the judgment.

HIS HONOR said: This is a summons for review of taxation. Mr. Slack obtained a rule *nisi* requiring the Licensing Magistrates and Mr. Toohey, Inspector of Police, to show cause why a writ of *mandamus* should not issue commanding the magistrates to hear and determine Mr. Slack's application for a certificate authorising the issue to him of a publican's licence. The rule was discharged by the order of the Court of April 8, 1884, which directed it to be referred to the Prothonotary to tax the costs of the Inspector of Police of and occasioned by the rule *nisi*, and that application, and that such costs, when taxed, should be paid by Mr. Slack to the Crown Solicitor, the attorney for the licensing magistrates and for the Inspector. The present summons asks me, in effect, to set aside the order of the Court, and to direct the officer of the Court to disobey the order. It has been contended that these costs are not due to the Crown, not being expressly authorised by any statute, and that the Crown Solicitor, being a civil servant, and paid an annual salary by the Crown for all work done by him on behalf of Her Majesty, is not entitled to receive the costs he has incurred in opposing the rule *nisi* on behalf of the Inspector of Police. It is a mistake to identify the Crown and the question of the right of the Crown to costs, with the Inspector of Police, and the question of his right to costs. As a member of the police force in charge of the place in which the premises for which a licence was sought were situated, he had a right expressly given to him by the Act to object to the grant of a licence, Act No. 566, sec. 38, and he might be awarded reasonable costs in the event of his objection being successful, sec. 40. When he was brought before this Court at the instance of the unsuccessful applicant, for a licence to show cause why a *mandamus* should not issue to the magistrates, he occupied a position differing in no respect from that of any other person who might have exercised the statutory right of objecting to the grant of the licence except this: That he was represented before the Court by a solicitor who receives an annual salary from the Crown for his services. But it was decided in the case of *The Attorney-General v. Shillibeer*, 4 Ex. R. 606, which was cited in support of the application that that circumstance makes no difference. The costs of an application for a *mandamus* are in all cases in the discretion of the Court, and there is no principle upon which an officer of police, who had successfully urged objections against the grant of a licence, should he deprived of the costs of successfully opposing the issue of a writ of *mandamus*. The order of this Court was right, in my opinion, and if it were not, it must be obeyed by the taxing officer, so long as it is unrescinded. I dismiss the application with costs.

Solicitors: For plaintiff, *Sievwright*; for defendant, *Crown Solicitor*.

Exparte SAYERS. August 8.

13 *Geo. II., c.* 18, *s.* 5—*Fiat for writ of* certiorari —*Proof on oath of six days' notice in writing necessary.*

MR. WOODFALL applied for a fiat for a writ of *certiorari* to bring up proceedings on a debtor's summons before justices at Beechworth, with the view to their being quashed, on the ground that the defendant had not been served with the order of the justices.

HIS HONOR said: This is an application for a fiat for a writ of *certiorari* to bring up the proceeding on a debtor's summons heard by two justices of Beechworth. The party moving for the writ, James Sayers, has not offered any proof upon oath as he is required by 13 Geo. II., ch. 18, sec. 5, to do, that six days' notice in writing has been given to the justices whose proceedings it is sought to have quashed.

Solicitors for defendant, *Klingender*, *Charsley* and *Dickson*.

WAINMAN v. HANSEN. August 8.

Rules of Supreme Court, 1884, *Order XIV., Rules* 1 *and* 3.—*Circumstances under which a plaintiff will be allowed to sign final judgment—Onus of proving that he is entitled to defend lies on defendant—What proof will be sufficient—Power of a judge under Order XIV., Rule* 3, *exercised only in exceptional cases.*

Action brought to recover balance alleged to be due on a building contract. The defence was payment, and alleged a counter-claim of £36 odd as due by the plaintiff to the defendant.

The plaintiff applied on a summons under Order XIV., Rule 1, for liberty to sign final judgment, or that the defendant might be ordered under Rule 3, to attend and be examined on oath.

MR. DUFFY appeared in support of the application; MR. ISAACS appeared to oppose.

HIS HONOR said: This was an application by the plaintiff to sign final judgment for the amount endorsed on the amended particulars, or special endorsement under Order XIV., Rule 1. The discretionary powers given to a judge by this order are very large, and I agree that they ought te be used, especially at the commencement of a new system of procedure, with scrupulous care. The object of the provisions of this order is to attain the end of litigation, viz., a judgment, with as little delay as possible, and to reduce the costs of litigation for the benefit of both parties as much as possible in those cases in which it is plain that the defendant has no real defence. The procedure is an extension of the practice which has long prevailed with

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reference to bills of exchange under Part 1 of "The Instruments and Securities Statute, 1864." In an action on a bill of exchange the defendant has to obtain leave to plead; in the cases to which this order applies, the initiative lies on the plaintiff, who can only move on an affidavit verifying the cause of action, and stating the belief that there is no defence to the action. In both cases the burden of proving that he is entitled to defend rests on the defendant. The authorities cited by Mr. Isaacs show what are the general rules which should govern the discretion of the judge in dealing with applications under this order, and they show further that in applying those rules to the circumstances of different cases there has been considerable variety and conflict of opinion amongst judges. The following general considerations should not be lost sight of:—"This is a remedy that ought not to be used except where the plaintiff's case is clear, and if there be any doubt as to the right to recover he ought not to be allowed to avail himself of a process so summary in its nature," *per* Bramwell, L.J., in *Ray v. Barker*, 4 Ex. Div., p. 281. "If the judge is satisfied upon the affidavits before him that there really is a defence on the merits, it is a matter of right, unless there be something extraordinary, that the defendant should be able to raise that defence on the merits, either to the whole or to a part. . . It is not enough to swear, 'I say I owe the man nothing.' You must satisfy the judge that there is reasonable ground for saying so. So, again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts, pointing to the fraud as to satisfy the judge that these are facts that make it reasonable that you should be allowed to raise that defence; and in like manner as to illegality and every other defence that might be mentioned," *per* Lord Blackburn, in *Wallingford v. Mutual Society*, 5 App. Cas., at p. 704. "When the defendant goes beyond the mere form of stating that he has a good defence, and states what his defence is, and gives reason for thinking that his defence is substantial, and will be sustained in evidence, he ought not to be compelled to pay money into Court as a condition of his being allowed to come in and defend the action," *per* Cockburn, C.J., *Runnacles v. Mesquita*, 1 Q. B. D., at p. 418. "The defendant is to have leave to defend either if he has a good defence upon the merits, or if he discloses 'such facts as may be deemed to entitle him to defend.' If, therefore, the defendant shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, he ought not to be debarred from all power to defeat the demand made upon him. By the very words of the order, the plaintiff is not to be allowed to sign judgment merely because the defendant's affidavit does not show a complete 'defence,'" *per* Brett, L.J., in *Ray v. Barker*, 4 Ex. D., at p. 283. In the present case the plaintiff, the surviving partner of a building firm, claims a balance of £163 6s. to be due to him from the defendant. The defendant alleges a payment by him to the deceased partner of £200 beyond the amounts acknowledged by the plaintiff, and contends that he has overpaid the plaintiff's firm by £36 14s. The affidavit of the defendant contains allegations and discloses facts amply sufficient, in my opinion, to entitle him to defend the action, and I therefore dismiss the summons with costs. I certify for counsel. Application was then made to me that the defendant might be ordered to attend and be examined on oath under Rule 3 of Order XIV. I concur with the observation of Field, J., in *Millard v. Raddeley and Others*, W. N., p. 96, April 5, 1884, that it is only in an exceptional case that the power given by this rule of examining the defendant should be exercised, and that if it became a practice it would lead to great expense, and to actions being tried on a summons under Order XIV., which was never intended to be done.

Application refused.

August 8.

LONG TUNNEL GOLD MINING COMPANY v. ZIMMIER.

Judicature Act, 1883 (*No.* 761), *ss.* 8 (*sub-sec.* 4), 64.

Charging order—Recognition by a judge of an equitable claim.

Application for an order under sec. 64 of Act No. 761, charging shares which the defendant held in the Langridge Great Extended Company, for a debt due by her for calls in the plaintiff company, for which she had given a cheque, which was dishonored. The defendant alleged that she held the shares in trust for her husband.

HIS HONOR said: The plaintiff obtained a conditional order under sec. 64 of the Judicature Act, 1883, charging shares standing in the name of the defendant in the Langridge Great Extended Gold Mining Company, No Liability. The defendant, who was a registered shareholder in the plaintiff company, was sued upon a dishonored cheque given by her in payment of a call, and suffered judgment by default. On showing cause against the order, affidavits of the defendant and of her husband were used, in which it was alleged that the defendant never had any property of her own, and that she held the shares in the Langridge Gold Mining Extended Company, which had been purchased with her husband's money, as a trustee only for her husband. The case of *Cragg v. Taylor*, L. R. I Ex., p. 148, and earlier authorities were quoted to show that Common Law courts have refused, upon a motion to charge stock or shares, to consider equitable rights and interests. But now, by the Judicature Act, 1883, sec. 8 (4), it is provided that "the Court and every judge thereof shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter in the same

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manner as the Court in its equitable jurisdiction would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act." I am called upon, therefore, to deal with the equitable claim now put forward by the defendant on behalf of her husband. The circumstances as stated in the affidavits of both the husband and the wife suggest suspicion. No explanation is offered as to why the defendant has been allowed to take charge of her husband's money, and to invest and manage it for an indefinite time as if it were her own. Neither is the fact accounted for that an attempt was made by the defendant shortly before judgment was signed against her to transfer the shares standing in her name in the Langridge Company to her husband. She herself declares that she never had any property, but there is evidence of a statement made by her husband that she was in the habit of investing in mining stock without his knowledge or consent, that he disapproved of her entering into speculations in mining shares of any kind, and that he would not pay any of her debts incurred in such speculations. I cannot accept the inconsistent and uncorroborated statements of the husband and the wife in this case as satisfactory proof of the existence of the alleged trust. The order will be absolute, with £2 2s. costs against the defendant.

August 8.

FAHEY v. IVEY AND KENNEDY.

Judicature Act 1883 (*No.* 761), *sec.* 22—*Rules of the Supreme Court* 1884, *Order LXV., rule* 1—*Discretion of a judge in Chambers with regard to costs.*

This was an action for assault, malicious prosecution, and false imprisonment. The defendants by summons under sec. 43 of Act No. 345, called upon the plaintiff to show cause why the action should not be remitted to the County Court, or that he should give security for costs.

MR. ISAACS, on behalf of the plaintiff, opposed the application on the grounds that, as there were difficult questions to be decided in it, it ought to be tried in the Supreme Court.

HIS HONOR, in giving judgment, said: The defendants applied to have this case remitted for trial before the County Court, Melbourne, under sec. 43 of the County Court Statute, 1869. I refuse the application, being satisfied by the affidavits that the plaintiff has a cause of action fit to be prosecuted in the Supreme Court. Application was then made on behalf of the plaintiff for costs of attendance on the summons. No power of awarding costs has hitherto existed in cases within the 43rd section, the statute not giving the power in express terms. Order LXV., Rule 1 of "The Rules of the Supreme Court, August, 1884," provides that "subject to the provisions of the Act, the costs of and incident to all proceedings in the Court shall be in the discretion of the Court, but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity, provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried, or the Full Court shall otherwise order." It was held in *Garnett v. Bradly*, 3 App. Cas., p. 494, followed by *Ex parte Mercer's Company*, 10 C. D., p. 481, that the combined effect of the Judicature Act, 1875, and of Order LXV, Rule 1, which corresponds with the rule above quoted, and must be dealt with as part of the Act, was to repeal all previous acts which directed costs to follow certain rules without leaving the Court a discretion, and to empower the Court and the judges to exercise their judicial discretion as to costs in all cases subject to the exceptions stated in the order. Section 22 of the Judicature Act, 1883, authorises a judge to exercise in Chambers all or any part of the jurisdiction by that Act vested in the Court in all such causes, matters, and proceedings as before the passing of the Act might have been heard in Chambers by a single judge. The question of costs was one of those numerous matters in which a judge in Chambers might, before the passing of the Judicature Act, 1883, exercise the jurisdiction of the Court, unless such exercise was expressly reserved to the Court alone by the terms of the Act. See *Smeaton v. Collier*, 1 Ex., p 457, and *per* Molesworth, J., in *re Fisher, ex parte Greenlaw*, 2 V. R., J. E. and M., p. 29. I think, therefore, that a judge in Chambers can exercise the full discretion now vested in the Court with regard to costs, and that the application for costs in this case should be granted. Summons dismissed, with costs, £3 3s. I certify for counsel.

Solicitors: For plaintiff, *Randall, Mitchell*, and *Nevett*; for defendants, *Watson*.

CAMERON v. CAMERON. August 12.

Marriage and Matrimonial Causes Statute Amendment Act 1883 (*No.* 787), *ss.* 15 *and* 16—*Reg. Gen.*, 18*th Sept.*, 1861, *Rules*, 18, 21, *and* 26—*Application to have divorce suit set down for trial before a single judge unnecessary.*

Application by petitioner to have a divorce cause set down for trial before a single judge.

The facts sufficiently appear from the judgment.

HIS HONOR said: This is an application by a petitioner to have a cause in the Divorce and Matrimonial Causes Jurisdiction set down for trial before a single judge. The answer was filed on May 30, and upon the expiration of twenty days from that date the cause was at issue (rule 18). After twenty days from the time a cause is at issue the petitioner may file the record (rule 21); and within twenty days after the record has been filed the petitioner is to set down

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the cause as ready for trial (rule 26). He may do this whenever the cause is not to be heard before a jury without a judge's order under the present rules. Under the new Act No. 787 a single judge of the Court alone may hear and determine all matters arising in the Court in this jurisdiction which have hitherto been heard and determined by the Full Court (sec. 15). It is not necessary, in my opinion, to obtain a judge's order for the trial of a cause before a single judge under this Act. In the absence of a direction by a judge that the cause shall be heard and determined by the Full Court (sec. 16), or by two judge's (sec. 15). A single judge will sit to hear and determine all matters arising in this jurisdiction, and causes may be set down for trial as heretofore without a judge's order directing them to be tried by one or more judges. The present application is unnecessary. I make no order.

Proctors: For petitioner, *Grylls*; for respondent, *Kidston*.

August 12.

BANK OF VICTORIA V. M'LAY.

Rules of Supreme Court 1884—*Order XVI., Rule 2—Substitution of plaintiff—Costs.*

Application for substituting plaintiff.

HIS HONOR said: This is an application by the plaintiff under Order XVI., Rule 2, that Wm. Mendell, the plaintiff's manager, may be substituted as plaintiff in lieu of the Bank of Victoria. The action is brought to recover possession of land of which it is alleged that the defendant was a caretaker for the plaintiff bank under a written agreement. It is stated to have been discovered after the action was commenced that the legal estate in the land was vested in the person now proposed to be substituted as plaintiff, as trustee for the bank. An affidavit has been filed on behalf of the defendant which has not been answered by the plaintiff, and the statements contained in it make it proper, in my opinion, that the amendment asked for should be accompanied with terms. Order, that on payment of the costs of this summons and of all costs of and occasioned by the amendment of the writ, the name of Wm. Mendell be substituted as plaintiff in lieu of the Bank of Victoria, without prejudice to the defendant's right to apply; that the names of the present plaintiff, of Thomas Young, manager of the Bank of Victoria at Castlemaine, and of Wm. Thomas Cox, or of one or more of them, be added as necessary parties within Order XVI., Rule 11, and to take all just exceptions to the sufficiency of the demand of possession or notice to quit by the present plaintiffs, the Bank of Victoria, dated May 26, 1884.

August 14.

ORIENTAL BANK V. HALSTEAD AND ANOTHER.

Plaintiff company in liquidation—Removal of assets out of the reach of the process of the Court—Application by defendant for security for costs—Rules of Supreme Court, August, 1884, *rr. 4 and* 5.

Application by a defendant for security for costs against the plaintiff company which was in liquidation.

The applicant asked for costs on the grounds. 1. That the plaintiff company was a foreign corporation; 2. That it was an unregistered company so far as this colony is concerned; 3. The real plaintiff, viz., the liquidator, was not before the Court; 4. That there was an abstraction of assets going on, and there was no one in the colony from whom the defendants could get their costs if successful.

MR. HODGES to oppose, contended that security for costs ought not to be given, and cited *United Ports and General Insurance Co. v. Hill.*, L. R. 5 Q. B. 395; *Deuston v. Ashton*, L. R. 4 Q. B. 590; *Sykes v. Sykes*, L. R. 4 C. P. 645.

HIS HONOR said: The defendants have obtained leave to appear and defend an action brought by the Oriental Bank Corporation on a cheque drawn by the defendant's for £3901 12s. 6d. One of the defendants, Andrew Kerr, now applies that the plaintiff may be required to give security for costs. It appears from the affidavits that the plaintiff bank has been compelled to close its doors and stop the transaction of its business as a bank both at the head office in London and at the branch bank at Melbourne; that a petition to wind-up the corporation has been presented to and accepted by a judge of the High Court of Justice in England; that an official liquidator has been appointed and that the corporation is now in course of being wound-up under the provisions of the Companies Act 1862 and 1867. A similar order for winding-up was made by a judge of the Supreme Court of Victoria, but no official liquidator has been appointed, and proceedings under the order have been stayed. The poverty or even the insolvency of a plaintiff is not a ground for requiring him to give security for a defendant's costs. It is, undoubtedly, a hardship that a defendant should be compelled to carry on litigation with an opponent who is apparently unable to pay the costs of suit in the event of his being unsuccessful. But it has been held that it would be a greater hardship to prohibit a plaintiff from asserting his alleged rights in a court of law merely because he is poor. The cases cited by Mr. Hodges show that no distinction in this respect is or ought to be drawn between an action brought by a pauper plaintiff, and an action brought by the assignee of a bankrupt, or by the liquidator of a company ordered to be wound-up, and brought either in his own name or in the name of the company. I think that the application in the present case cannot be supported therefore on this ground. It also appears from the affidavits that this official liquidator is at present represented in Victoria by Mr. Charles Hepburn, who acts under a power of attorney, and that the corporation has numerous assets in Victoria consisting of mortgages,

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freeholds, and money. The following statements appear in the 19th paragraph on the affidavit in support of the summons. "It is a matter of public notoriety, and I believe it to be a fact, that between the 5th day of May, 1884, and the 30th day of June, 1884, remittances to the value of £500,000, representing assets of the corporation collected in Victoria, have been sent to London to be dealt with by the official liquidator there, and I believe that, according to the instructions given by the official liquidator to his agent (who is the said Charles Hepburn) or to others of his agents in this colony, all monies collected and representing assets of the corporation are from time to time forthwith remitted to London, and I am instructed and advised, and verily believe that by reason thereof and of the said vesting order, the said Andrew Kerr will be unable to recover his costs of this action in the event of his defeating the claim and recovering costs as against the plaintiff corporation." These statements are not contradicted or qualified by the attorney of the liquidator. Assuming them to be true they show that the assets of the plaintiff corporation are being collected and removed from Victoria, and that possibly when this action reaches its final stage there will no longer be any property of the plaintiff on which the process of the Court can operate. It is unnecessary, I think, to consider whether the Oriental Bank Corporation is, or is not, a corporation having a domicile foreign to Victoria for all purposes of litigation. A plaintiff is compellable to give security for costs whenever, owing to his permanent absence from Victoria, he cannot be fixed if he should be unsuccessful in his litigation by the direct process of the Court, *per* Alderson, B., in *Kilkenny and G. S. and W. Ry. Co. v. Fielden*, 6 Ex. 86. If the whole of the property of the plaintiff corporation be removed from Victoria, the plaintiff and the assets of the plaintiff will be equally inaccessible to the direct process of this Court for the purpose of satisfying the defendant's claim for costs as if no branch bank existed here, and the plaintiff corporation were permanently and exclusively domiciled abroad. The undisputed facts bring this case, in my opinion, within the principle and reason of the rule. The plaintiff corporation must be required, therefore, to give security for costs, not because it is insolvent, but because steps are being taken which may have the effect of removing all its assets beyond reach of the process of the Court. Order that the plaintiff company within 14 days from this date pay into Court the sum of £300 to abide the event of the action as security for the costs of the defendant, Andrew Kerr. I reserve leave to the attorney of the liquidator to apply to vary as allowed by Rules 4 and 5 of the Rules of the Supreme Court, August, 1884, the manner and form of security hereby ordered if he should desire to vary it. Costs of this application to be costs in the cause. I certify for counsel.

Attorneys: For plaintiff, *Bennett, Attenborough, Wilks*, and *Nunn*; for defendants, *Crisp, Lewis*, and *Hedderwick*.

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

August 14.

IN THE WILL AND CODICIL OF JOHN MUNYARD.

Codicil on two sheets of paper which were pinned together—Second sheet only signed—Affidavit.

The codicil was on two sheets of paper which were pinned together. The second sheet only was signed.

MR. ISAACS moved for probate.

HIS HONOR refused the application, and said that he would require an affidavit showing what the state of the two sheets was when the codicil was executed.

Application refused.

Proctor, *Eggleston*.

August 14.

IN THE ESTATE OF MONICHON.

Administration de bonis non—*Consent of widow.*

Administration had been granted to the eldest son of the intestate with the consent of the widow. The administrator died without having fully administered. The only surviving son of the intestate now applied for administration *de bonis non*. No consent of the widow was filed.

MR. WOOLF for applicant.

HIS HONOR said: The widow has not consented to this application. It does not follow that because a widow consents to administration being granted to one son that she will consent to administration being taken out by another. I refuse the application.

Application refused.

Proctors: *Blake* and *Riggall*.

August 14.

IN THE ESTATE OF WILLIAM DUNBAR.

Administration—Clerical error as to value of property—Bond.

The applicant in her affidavit stated that the estate was of the value of £3100, of which the sum of £2500 represented the real estate, and £650 represented the personal.

MR. MOORE pointed out that the sums of £2500 and £650 when added together made the sum of £3150, and submitted that, as this was a mere clerical error, administration should be granted to the applicant.

HIS HONOR granted the application, the bond entered into to be for the proper amount, namely the amount of the two sums added together.

Proctor, *O'Halloran*.

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IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham).

August 13.

THE QUEEN v. BAILES AND OTHERS, *ex parte* PICKUP.

Mandamus—*Common Law Procedure Statute* 1865 (*No.* 274), *sec.* 252—*Discretion of Court in the matter of costs—Party unsuccessfully resisting the issue of a* mandamus *relying upon the decision of the Court to which the* mandamus *is directed is not thereby exempt from costs—Body exercising* quasi-*judicial functions not to be fixed with costs unless guilty of improper conduct—Supreme Court* (*Constitution*) 1852 (*No.* 10), *sec.* 19; *Judicature Act,* 1883 (*No.* 761), *secs.* 2, 13, 22—*Sec.* 19, *Act No.* 10, *repealed by sec.* 2, *Act No.* 761—*Terms abolished—Jurisdiction and powers of a judge sitting in Court or in Chambers.*

This was a summons calling on the members of the Revision Court at Sandhurst and Mr. W. F. Gissing to show cause why they should not pay the costs of Mr. Pickup in obtaining a *mandamus* to compel the Revision Court to hear objections to Gissing's name appearing on the ratepayers' roll.

MR. HODGES appeared for Pickup, MR. ISAACS for the Revision Court, and MR. W. BROWN for Gissing.

MR. JUSTICE HIGINBOTHAM gave the following decision: This was a summons calling on certain members of the council of the city of Sandhurst, constituting the Revision Court recently held for the city, and W. F. Gissing, to show cause why the costs of and occasioned by an application for a writ of *mandamus* to compel the members of the Revision Court to hear and determine an objection made by John Pickup to the name of W. F. Gissing being retained upon the voters' list for the Darling Ward of the city, and the costs of the order made thereon, and of and occasioned by the writ of *mandamus* issued on 22nd July, 1884, in pursuance of the order, should not be paid by the members of the Revision Court and by W. F. Gissing to the objector, John Pickup. A preliminary objection was taken by Mr. Isaacs to my hearing this summons as a judge sitting in Chambers, on the ground that section 19 of the Act 15 Victoria, No. 10—commonly called "the emergency clause"—is no longer law. I was of opinion that the objection was a good one. "Vacation" in the sense which that word bears in this 19th section, viz., all parts of the year not included in any term, no longer exists. "Terms," except as a measure for determining time, are abolished, and have no existence as applicable to any sittings or business of the Court (The Judicature Act 1883, sec 13). The conditions necessary for the exercise by a judge of the powers of the Court as well as for the review by the Court of the orders made by a judge under sec. 19, no longer exist; the section itself is inconsistent with the Judicature Act 1883, which has abolished those conditions, and it is therefore, I think, repealed by the second section of the latter Act. The necessity for arranging for the despatch at all times of all the business of the Court which a judge in Chambers has not jurisdiction to deal with, is not, however, overlooked in the Judicature Act 1883. By that Act a judge sitting in Court shall be deemed to constitute the Court (sec. 22); and when so sitting may, subject to appeal to the Full Court, hear and determine all such causes, matters, and proceedings as before the passing of the Judicature Act 1883 might have been heard in court (*Ib.*), and which are not required by that Act to be heard and determined by the Full Court (c. 11.) A judge may also exercise in Chambers the jurisdiction vested by the Judicature Act 1883 in the Court in all such causes, matters, and proceedings (1) as might before the passing of the Act have been heard in Chambers; or (2) as may by rules of Court, to be made after the coming into operation of the Act, be directed to be so heard (s. 22). By these enactments provision is or may be fully made for giving a single judge sitting in Chambers jurisdiction at all times to hear applications of every kind, whether properly belonging to Court or to Chambers, which may require to be immediately or promptly heard, as directed by the 19th section, and thus the emergency clause has ceased to be necessary. I allowed the objection. It was then arranged that the summons should be taken as notice, and should be heard in Court as a motion. The Court has a statutory discretion in the matter of the costs of any writ of *mandamus* (Common Law Practice Statute 1865, s. 252), and will for sufficient reason withhold them (*Reg. v. Pohlman*, 3 A. J. R., p. 109), but the Court in the exercise of its discretion will in general order costs to be paid by that party to the application who ultimately fails to that party who ultimately succeeds (*Reg. v. Justices of Surrey*, 9 Q. B., p. 37), and it is no ground for exempting a party unsuccessfully resisting the issue of a *mandamus* that he relies as Gissing, the person objected to, did in the present case, upon the decision of the Court to which the *mandamus* is directed—*Ib.*, and *Regina v. Justices of London*, 9 Q. B., p. 41. The costs of the application for the writ, and also the costs of the order and writ and of this application must be paid by Gissing to the objector, Pickup. The question of costs as regards the members of the Revision Court is a wholly different question. The Revision Court is a body exercising *quasi*-judicial functions. It made a mistake in giving effect to a bad objection taken to the notice of objection, but no impropriety of any kind has been suggested against any member of the Court. The general rule that the costs of a *mandamus* go to the successful party, is subject to the exception that when a judicial officer is required by *mandamus* to do an act he shall not be fixed with the costs unless he has been guilty of improper conduct (*Reg. v. Mayor of Lichfield*, 6 Jurist, p. 624.) I therefore refuse the application as regards the

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members of the Revision Court; and as there was no reason for bringing them before the Court on this motion, the applicant, Pickup, must pay them their costs of and occasioned by the present application.

August 15.

ORIENTAL BANK v. HALSTEAD AND ANOTHER.

Instruments and Securities Statute 1864 (*No.* 204), *sec.* 19—*Rules of the Supreme Court* 1884, *Order IX.*, *r.* 6; *Order XVI.*, *rr.* 4, 6, 14—*Action on cheque drawn by partnership firm—Service of writ.*

The plaintiffs brought an action against the defendants, Halstead and Kerr, who were partners, upon a cheque drawn by them. The defendants were sued not in the name of the firm but as joint contractors. The writ was served on the manager of the two partners. The defendant Halstead is out of the jurisdiction. Application was now made by the defendant Kerr that all further proceedings as against him be stayed until the writ has been served upon the defendant Halstead and he has appeared, or judgment been signed against him.

HIS HONOR said: This is an application on summons by the defendant, Andrew Kerr, that all further proceedings in this action, as against the applicant, be stayed until the writ of summons has been duly served upon the defendant, James Halstead, and such defendant has appeared, or judgment been signed against him. The action is brought under the Instruments and Securities Statute 1864, part I., against "J. Halstead and A. Kerr upon a cheque drawn upon the National Bank of Australasia by the defendants,' under the style of 'Halstead, Kerr, and Co.'" The defendants have not been sued, as they might have been (Order XVI., Rule 14) in the name of the firm, but as two persons jointly liable as joint contractors. It appears from the memorandum on the writ that service was effected by delivering the writ "to the manager of the said J. Halstead and A. Kerr." This service, which might, perhaps, have been good service, though the memorandum is defective in not stating the place of service as well as the person served (under Order IX., Rule 6), if the defendants had been served in the name of the firm, was clearly not a personal service as required by the Instruments and Securities Statute 1864, section 19, upon which the plaintiff corporation could have signed final judgment (*Pollock and Another v. Campbell Bros.*, 1 Ex. D. 50). But the defendant Kerr treated this as good service so far as it applied to himself; he sought for and obtained leave to appear to the writ to defend the action, and he took the further step of applying for an order for the plaintiff corporation to give security for his costs. This defendant is not now in a better position, therefore, than he would have been in if, under the old procedure, he had been sued alone for a debt jointly due by him and another person; and in that case he could only have compelled the joinder of the other contracting party by giving the plaintiff a better writ—that is to say, by pleading the non-joinder in abatement, and showing that the co-contractor was within the jurisdiction of the Court. The defendant Halstead is stated to be in England; at all events, he is not alleged in the affidavit filed for the defendant Kerr to be in Victoria. Under the new rules even this limited right is taken away from a defendant sued on a contract upon which another is jointly liable with him; for a plaintiff is at liberty to join one or more only of the parties liable (Order XVI., Rule 6), and judgment may be signed against one or more defendants who may be found to be liable without amendment (Order XVI., Rule 4). This summons is merely dilatory. I dismiss it with costs, to be taxed against the defendant Kerr, who may have three days' further time to plead on condition of taking short notice of trial.

Solicitors: For plaintiff, *Bennett, Attenborough, Wilks* and *Nunn*; for defendants, *Crisp, Lewis* and *Hedderwick*.

(Before His Honor Mr. Justice Holroyd.)

SLACK v. TERRY. August 11.

County Court Statute 1869 (*No.* 345), *sec.* 120—*Appeal from County Court—Rehearing directed before a judge of the Supreme Court—Direction that costs theretofore incurred and thereinafter incurred be paid by unsuccessful party—Costs thereinafter incurred include the costs of the rehearing—Costs—Review of taxation.*

This was a summons on behalf of the plaintiff for a review of taxation of costs. The plaintiff had brought his action in the County Court and was nonsuited. He applied for a new trial, which was refused, and he then appealed to the Supreme Court, which set aside the nonsuit and directed the case to be reheard before a judge of the Supreme Court. The case was reheard in the Supreme Court and a verdict was given for the defendant. In the rule allowing the appeal from the County Court and directing a rehearing, it was provided that plaintiff should have the costs of the appeal, and the costs theretofore incurred (except the costs of the trial in the County Court), and that the costs thereafter to be incurred should be borne by the unsuccessful party. Slack having been ultimately unsuccessful, the prothonotary had to tax two bills of costs, those of the plaintiff in regard to the appeal and a portion of the proceedings in the County Court, and those of the defendant for some of the proceedings in the County Court, and also for the rehearing in the Supreme Court. The plaintiff objected to the result of that taxation, and desired to have it reviewed.

MR. SIEVWRIGHT appeared for the plaintiff; MR. ISAACS for the defendant.

HIS HONOR said: The Court is empowered by

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section 120 of the County Court Statute, when it allows an appeal and directs a cause to be reheard before a judge of the Supreme Court, to make such order with respect to the costs of the action as it may think proper. The order of the 29th November, 1883, setting aside the verdict which had been entered for the defendant in the County Court, directed that the party who failed on the rehearing should pay to the party who succeeded the costs of the action "theretofore incurred and thereinafter incurred," save the costs of the trial in the County Court. As the rehearing is a part of the action the words "thereinafter incurred" must necessarily include the costs of the rehearing. The summons is to review the taxation made by the prothonotary under the order of 29th November, 1883, of defendant's and plaintiff's two separate bills of costs, on the ground that the prothonotary taxed the defendant's costs on a higher and the plaintiff's on a lower scale than that allowed by law. Plaintiff's bill of costs and his attorney's affirmation are not before me. Taking Mr. Sievwright's statement to be true, that plaintiff's costs are taxed on the lower County Court scale, that would be correct as to so much of the costs of the appeal as were costs incurred in the County Court. As to costs of appeal after the case arrived in the Supreme Court, the costs, according to *Randall v. Smith* (3 V. L. R. (L.) 56), should be taxed according to the prothonotary's discretion. Similarly, defendant's costs of trial in the County Court were properly taxed on the lowest County Court scale, and the costs of the rehearing at the prothonotary's discretion. The summons, therefore, fails on the ground on which it was taken out, and must be dismissed with costs. Objections were taken that certain items were allowed which were not sanctioned by this or that scale. These were all items for costs of rehearing, for which there is no fixed scale. Other objections which went to the exercise of the prothonotary's discretion, as far as I can judge on the materials before me, would not be sustainable, even if I could entertain them. But I cannot entertain them on this summons. I certify for counsel.

Summons dismissed with costs.

August 11.

Re THOMAS JAQUES MARTIN, *exparte* THE EQUITABLE INSURANCE COMPANY OF THE UNITED STATES.

Copyright Act 1869 (*No.* 350), *secs.* 36, 50—*Who is an aggrieved person within sec.* 50?—*Who is the author of an engraving?—What is an original engraving?*

This was a motion on behalf of the Equitable Insurance Company of the United States to have removed from the register of proprietors of copyright in paintings, drawings, works of sculpture, engravings, and photographs, the entry of Thomas Jaques Martin as proprietor of a copyright in an engraving, the Colonial Mutual Life Assurance, No. 1549.

MR. HODGES appeared in support of the application; DR. MADDEN to oppose it.

MR. JUSTICE HOLROYD, in delivering judgment, said: The application of which I have to dispose is for an order to expunge "from the register of proprietors of copyright in paintings, drawings, works of sculpture, engravings, and photographs," the entry of Thomas Jaques Martin as proprietor of a copyright in an engraving, Colonial Mutual Life Assurance, No. 1549. The engraving was registered on the 23rd June, 1881, and, as appears by the description of it in the register and a copy exhibited, it depicts a draped female figure armed with spear and shield protecting another draped female figure and two children, the shield bearing the words "Colonial Mutual" and the pedestal the words "Life Assurance." Martin opposed the application, and made an affidavit from which I have summarised the following short statement of his case. He is now, and has been since the 4th September, 1873, the general manager of the Colonial Mutual Life Assurance Society Limited, whose head office is in Melbourne, and which has branch offices in all the Australian colonies, in Tasmania, and in New Zealand. He designed the engraving in 1877, and since June of that year has permitted the Colonial Assurance Society to use it as an emblem, and ever since that time it has been extensively used by the said society in all the said colonies without objection until now, and in all is known as its emblem. It appears on conspicuous parts of the society's buildings, and is printed on various documents which the society issues. For Mr. Martin it has been in the first place objected that the applicant is not a person aggrieved within the meaning of section 50 of the Copyright Act 1869, and has therefore no right to complain. The applicant is the Equitable Life Assurance Society of the United States, which has carried on business in the State of New York for over 25 years, and is incorporated under the law of that State. About 15 years ago the last-named society, according to the affidavits filed on its behalf, erected a group of statuary over the door of its head office in the city of New York after a certain design which it then adopted, and has since used the same design on its policies, advertisements, and otherwise, so that it has become known as the distinctive mark of the society. The Equitable Society commenced business in Melbourne on the 1st of April last, and in an advertisement which it published in a Melbourne newspaper in that month a copy of its emblem appeared. This produced a letter from Martin, remonstrating with the publisher, and pointing out the close resemblance between the engraving of which he had registered the copyright, and the print which had appeared in the newspaper. The Equitable Society impugns Martin's copyright

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on the ground that he is not the author of the engraving, and that the engraving is not original. Commenting on a clause similar to that which I am considering (5 and 6 Vict. c. 45, s. 14) Blackburn, J., says, that to be aggrieved "the applicant must have some substantial objection, and one going to the merits of the registered proprietor's title" (*Graves's case*, L. R. 4 Q. B. 721). The definition of the word by Hannen, J., is somewhat different: "A person to be aggrieved must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application" (*Ib.* 724). In my opinion the Equitable Society has brought itself within both definitions. Its objections are substantial, if it can sustain them, and cut away completely the merits of Martin's registration. This society also intends to pursue its business here, and to continue to use its emblem for business purposes. The copyright claimed by Martin may be inconsistent with its right, if it has the right, and stands in the way of its intentions. The two emblems are so much alike that if Martin is entitled to have his name retained on the register, he might, in an action against the Equitable Society, throw upon that society the burden of proving that its emblem was not a colorable imitation of his own. Passing to the validity of the copyright, we must look at section 36 of No. 350, which enacts that "the author of every new and original painting, drawing, work of sculpture, engraving and photograph which shall be made in the colony of Victoria, and his assigns, shall have the sole and exclusive right of copying, photographing, engraving, reproducing, and multiplying such painting, drawing, work of sculpture, engraving, and the design thereof, or such photograph and the negative thereof" for the terms therein mentioned, but provides that when any such work shall be executed for another person for a good or a valuable consideration the copyright shall belong to that other person, unless expressly reserved to the person who executed the work. I have carefully studied this section, but the longer I studied it the more difficulties I detected, and I shall only attempt to state conclusions, so far as necessary for my decision. I think that the author of an engraving is the man who executes the work, as the author of a painting is the painter, and of a drawing the draughtsman (*Nottage v. Jackson*, 11 Q. B. D. 627). But the engraving must be new and original. What is an original engraving? Originality in its ordinary sense imports some exercise of the mind in invention or imagination, but engraving is purely an exercise of mechanical skill, unless the engraver has designed his subject. In that sense there might be joint authors of an original engraving—one who designed the subject, and the other who executed the work. An artist, I think, would not call an engraving original which merely translated a picture on a copper plate. Nevertheless, in tracing legislation respecting copyright in engravings we find strong ground for believing that our own Legislature did not intend to restrict the protection to engravings of which the author had also invented the design. The Copyright Act 1869 consolidates a number of English statutes. The English Act, 25 and 26 Vict., c. 68, the first section of which is the original of section 36 of our Act, creates a copyright of original paintings, drawings, and photographs, but does not relate to engravings. An Act of Geo. II., c. 13, conferred on the proprietor of an original engraving the sole liberty of printing and reprinting it for a limited period, but an Act of Geo. III., c. 38, extended the protection to engravings taken from any picture, drawing, model, or sculpture, either ancient or modern, in the same manner as if the print were from an original design of the engraver. When I remember the excellence to which some engravers have attained, and that nowadays engravings are almost always copies of some previously executed work of art, I am still more inclined to believe either that the word "original" has been applied to engravings by mistake, or that it has not been used in its ordinary sense. Suffice it to say that in my opinion an engraving is not original if it is a mere reproduction of another engraving, whether taken directly from the original or from any print or photograph of it. Some meaning must be assigned to the word, and that is the least I can give it. The word "new" is not to be found in the corresponding section of the English Act. "New" need not necessarily refer to novelty or design, but may import that the engraving must not have been published before out of Victoria. The copyright given by section 36 of the Copyright Act 1869 lasts for a term of years, and not for the life of the author and seven years afterwards, as in England under section 1 of 25 and 26 Vict., c. 68. Applying the above remarks to the present case, it will be seen that everything turns upon the question of fact whether Martin copied his emblem from that of the Equitable Society. As for authorship, he does not say expressly that he engraved the plate himself, or caused it to be engraved for him. But as he states that he designed the engraving and allowed the society of which he is manager to use it, the fair inference is that he either executed the work or procured it to be executed, and in the latter case he would take the benefit of the copyright in the author's stead. Martin's affidavit does not furnish any particulars about the design, nor does it say in so many words that he invented it. His counsel has said for him that the figure with the spear and shield represents Minerva, and that he copied it from a cameo which he saw in Italy, but that he invented the rest of the group himself. I can only treat that statement as an illustration of what might have happened. If part of his design has been copied from one model, the rest may have

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been taken from another. I have closely compared the two emblems, and the similarity is so striking that I cannot bring myself to believe that the one has not been copied from the other—at any rate, as regards the mother and standing child; for it is only with respect to the figure of Minerva that Martin suggests the possibility of a common model; and so far as both were copies, the Equitable Society's emblem was produced first. No one can notice the attitude of the standing child without perceiving the peculiar points of resemblance. Regarding Martin's engraving as a specimen of the fine arts, such spirit as there is in the composition seems to me manifestly borrowed, and marred in the borrowing. In fact, his looks like a weak imitation of the other. I do not think that a slight alteration in the attitude of the mother, which only spoils the effect, or the introduction of an infant in arms, can transform the copy into an original. To my eyes it hardly disguises the resemblance. I think I must make the order sought for expunging the entry, but I have felt so much doubt about the subject that I should be very glad if it were brought before the Full Court. I think the applicant is entitled to his costs.

Summons allowed with costs, entry of registration by Mr. T. J. Martin to be removed from the register.

(Before His Honor Mr. Justice Molesworth.)

August 20.

Re STANTON AND THE STATUTE OF TRUSTS.

Statute of Trusts 1864 (*No.* 234), *secs.* 56, 57—*Rules of Supreme Court*, 1884, *Order LV.*, *r.* 2, *sub. r.* 5—*Moneys paid in under sec.* 56 *of Act No.* 234 *can only be dealt with by petition.*

In this case the administrator of the estate of Wm. Stanton had paid into the Melbourne Savings Bank, under sec. 56 of the Statute of Trusts, a sum of £500 standing to the credit of the estate. There were five children entitled in distribution, four of whom were in the Melbourne Orphan Asylum. The present summons was taken out under Order LV., Rule 2, at the instance of the Asylum authorities to have certain payments made to them out of the funds towards the maintenance of the children.

MR. GOLDSMITH, for the administrator, took the preliminary objection that the proper course had not been taken, which was by petition and not by summons.

MR. A'BECKETT, for the summons, contended that the rule was not *ultra vires*, inasmuch as no special form of petition was required by the Statute, and the Court might direct that the petition might come before it by way of summons.

MR. GOLDSMITH offered no objection to the application on the merits, but pointed out that by sec. 57 of the Statute of Trusts the proper mode of dealing with moneys paid in under sec. 56 was by petition. If the rule in question did contemplate such an application being made on summons it could not over-ride the Act, as that had provided a new jurisdiction which must be strictly followed (*Pelling v. Goddard*, 9 Ch. D. 185).

HIS HONOR said: The application must be made by petition, as provided by the Statute of Trusts. I dismiss the summons with costs.

Solicitors: For applicant, *Moule* and *Seddon*; for administrator, *Hockins*.

Re RONAYNE, AN INFANT. August 21.

Guardian—Illegitimate child—A married woman cannot be appointed guardian of an infant—Costs.

Application for appointment of a guardian of an illegitimate child.

The father died in 1877 A.D., leaving a will by which he left half the income of his property to the infant till she should attain the age of 21 years or marriage, with a right to the whole *corpus* on the happening of either event. The father was a Protestant, the mother a Catholic. The mother maintained the child from 1877 to 1884, when she died, leaving a will by which she appointed one Cawley, a Catholic, to be guardian. The trustees applied that one Lidston, a married woman, be appointed guardian in order that the child should be brought up as a Protestant. There was a conflict of evidence as to the religion in which the child had been brought up during the father's lifetime.

MR. WORTHINGTON appeared for the trustees. MR. HIGGINS, for Cawley, took the objection that the applicant, being a married woman, could not be appointed guardian (*Re Kaye*, L. R. 1 Ch. 387).

HIS HONOR allowed the objection, and dismissed the application with costs, and directed that the trustees should not be allowed to charge their costs against the estate.

Solicitors: For trustees, *Wisewould* and *Gibbs*; for Cawley, *Duffy* and *Wilkinson*.

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

August 21.

IN THE ESTATE OF MARGARET PIRIE.

An executor of an executor, having taken out probate of his testator's will, cannot renounce the administration of the trusts of the original testator's will.

The deceased left a will appointing Alexander Dove and Robert Ramsay executors, who took out probate. Dove died shortly afterwards, leaving Ramsay sole surviving executor. Ramsay then died, leaving a will appointing executors. These last mentioned executors took out probate to Ramsay's will, but renounced their right and title to the probate and execution of the trusts of Margaret Pirie's will.

MR. NEIGHBOUR moved that administration *de bonis non* be granted to William Pirie, the only son

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of the deceased Margaret Pirie (*Brooke v. Haymes*, L. R. 6 Eq. 25; Williams on Executors (7th ed. 276).

His Honor refused the application on the grounds that as the executors had taken out probate to Ramsay's will they necessarily took upon themselves the administration of the trusts of Pirie's will.

Proctors: *Pentland* and *Roberts*.

August 21.

In the Estate of Mary Elizabeth Grant.

Administration granted in the estate of a married woman who left real estate only.

The intestate, a married woman, was married in the year 1846 A.D. The affidavit as to separate estate stated that the intestate died possessed of real estate only, which she acquired in 1881 A.D., out of moneys given to her from time to time by her husband for her sole use and benefit.

Mr. Woolf moved for letters of administration to the husband.

His Honor granted the application.

Proctor, *Donahoo*.

August 21.

In the Will of Henry Augustus Atkinson.

Probate—Affidavit of executors entitled "In the Estate of"—Reg. Gen., 23rd June, 1873—Schedule.

The affidavit of the executors was entitled "In the Estate of." The Registrar took the objection that as the deceased had left a will, the affidavit should be entitled "In the Will of."

Mr. Moore moved for probate to the executors, and pointed out that the form given by the schedule to the Reg. Gen. 23rd June, 1873, was entitled "In the Estate of."

His Honor granted the application.

Proctor, *Hughes* (for *Randall, Mitchell* and *Nevett*).

Equity Jurisdiction.

(Before His Honor Mr. Justice Molesworth.)

Bell v. Clarke. July 30.

Evidence taken by one party on commission after he and the other party have stated that they do not intend to call further evidence inadmissible on the hearing.

Evidence had been taken in this suit on commission. The plaintiff called his witnesses and stated that he did not intend to call any others. The defendant then called his witnesses. The plaintiff then stated that he wished to call two new witnesses, and recall one of the previous witnesses. The defendant objected, and the Commissioner took the evidence subject to the objection.

On the hearing,

Mr. Webb, Q.C., and Mr. a'Beckett, for the defendant, objected to the evidence of these three witnesses being read. The plaintiff had deliberately closed his case, and the defendant arranged his evidence accordingly. The plaintiff, therefore, could not again call evidence.

Dr. Madden and Mr. Higgins, for the plaintiff: There is no such thing as closing a case on a commission. Witnesses may be called till the commission expires. It is in the discretion of the Court to admit such evidence after the plaintiff's case has closed (*Re Hodgson*, 5 A. J. R. 49). The evidence has been taken, even if it were wrongly taken, on commission it can only be struck out in Chambers before the hearing (*Grill v. General Iron Screw Collier Company*, L. R. 1 C. P. 600; *Hodges v. Cobb*, L. R. 2 Q. B. 652).

Mr. Webb, Q.C., in reply: The practice of the Court is to hear objections when the evidence is proposed to be read. The cases cited are on the Common Law side of the Court.

His Honor, after referring to his notes in *Re Hodgson*, said: In that case what I did was under sec. 47 of the Insolvency Statute 1871, under which I had a discretion, and the question was merely whether I might exercise it to supply an informal defect. I do not think that made any practice or affirmed any general rule. I will refuse the evidence in this case.

Solicitors: For plaintiff, *Blake* and *Riggall*; for defendant, *Pavey* and *Wilson*.

Crow v. Campbell. August 8.

Where an administratrix purchases property by means of property left by the intestate, the acquired property is subject to the same trusts as the original property.

This was a suit by the children of the late Alexander Crow to have the estate administered under the direction of the Court, and to have it declared that certain property claimed by the defendant Alex. Campbell belonged to the estate.

Mr. a'Beckett and Mr. Neighbour appeared for the plaintiffs: Mr. Topp for Mrs. Campbell, mother of the plaintiffs, and who, after her first husband's death, married the other defendant, Alex. Campbell; Mr. Higgins for Alexander Campbell.

His Honor said: Mr. Alexander Crow carried on business as keeper of the St. Mungo Hotel, Ballarat; he was tenant of it, No. 7, section H, and acquired the freehold of an adjoining lot, No. 6. on which there was a billiard-room used with No. 7. He died November, 1877, leaving a widow—the defendant Mary Anne (now the wife of the defendant, Mr. Campbell)—and eight children, the plaintiffs. The widow treated the property as hers, carried on the business, maintaining herself and family, except the eldest son, Alex. B. Crow, who was in a railway office, supporting himself from 1876. She took administration to her husband's estate in July, 1878, representing his real property as under £200,

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his personal as under £260. She paid all his debts, funeral and testamentary expenses. She purchased lot No. 7 from the landlord for £650, securing that price with interest at 10 per cent. by mortgaging 6 and 7 to Mr. Deveson. Under the Act 391 she was proprietor of both, subject to the mortgage. She married the defendant, Campbell, on March 29, 1880, who also carried on an hotel business, and a trade in coal and wood, at Haddon, and had comparatively large property. She, as a witness for the plaintiff, says that there was no contract before their marriage; that he made some inquiries as to her pecuniary position. He says that she said that everything about the hotel, &c., was hers, that she had bought the hotel, but did not pay for it, but gave it and the billiardroom as part security for the price; that she said she was a little in debt, £70 or £80; that he said that if he married her, and came and spent his money putting the place to rights, he must have the hotel in his own name, not hers. She said he should have that, but she should like to have the billiardroom for the children; that he said she should have it clear of the mortgage. She expressed thanks, and he said he would not have it transferred until the mortgage was up; that they discussed the discretion of her having purchased the hotel; that he told her that the hotel was not fit to live in as it was; that she said that she had no money to repair it; that he said that it would take much money to repair it. She said that if it were put right it would improve the business very much, and that she was doing no business in the house then. In fact, from the entire evidence I would say that the business was doing badly. She had sold the billiard table for £80, owed some not considerable business and other debts, and the hotel was worth about £1,000, subject to the mortgage for £650. He put in some furniture before, more after the marriage. He from the marriage acted as master of the property, carried on the business in all important points, and had the license transferred to him. She and her eldest daughter generally acted at the bar, and she kept the accounts, mixing the receipts at the bar with other moneys passing through her hands; helped herself at discretion, defrayed all small house and family expenses, mixed together, as might have been expected if he married another woman accustomed to such business, and took the support of her family. All the bar takings were put into a till, which he emptied and lodged to his general bank account. He quarrelled with one of the plaintiffs, Louis, the second son, and sent him out to support himself. He expended much money, he says over £400, in improving the hotel. Its business increased. At the end of January, 1882, the value of the hotel increased to more than £2,000, the furniture of 1880 had been generally laid aside, and other and better had been substituted. There had been some disputes between Campbell and his wife. He complained of extravagance, talked of being driven to the Insolvent Court. On January, 29, 1882, for the first time the plaintiff, Alexander Brown Crow, had a dispute with Campbell in her presence. Campbell said the place was his, and he would allow no interference with it. The son said otherwise, and that Campbell could not pretend to have bought it by an outlay of £150. The mother heard them, and took no part. About that time Campbell, as he says, according to the pre-contract, called upon his wife to transfer the hotel to him. She says she did not understand the meaning of the transfer, which, in fact, was made on February 9, 1882, under the Act 391. Mr. Mann, Campbell's solicitor, prepared it by his instructions. It was as in consideration of £5. As brought to her, it included lots 6 and 7, contrary to Campbell's version of the agreement, but admitting explanation from Mann, being informed by the deeds, which mixed the properties. The wife objected to the transfer of lot 6, saying she thought it was to be left for the children, which supports Campbell's version of the pre-contract, and in fact the mortgage of Deveson was paid, the certificate of title to lot 7 was issued to Campbell, and of 6 to his wife, and the manner of dealing with the hotel, &c., was resumed. But their disagreements increased. Campbell complained that he did not get all the money which went or should have gone to the till, and ultimately, about January, 1884, he ordered the eldest daughter to leave the bar. The wife withdrew from it and interference with the hotel, and got a solicitor to write to Campbell demanding a separate maintenance from incompatibility of temper of themselves and their respective children. And another solicitor, acting for the plaintiffs, put forward their claim to the properties as to be regarded a trust by the administratrix for the plaintiff, Alex. B. Crow, and the infant children. That case is sought to be enforced by this bill. I think that the widow using lot No. 6 as she did for acquiring No. 7 would make 6 and 7 subject to the trusts of administration alike. I doubt whether Campbell should take subject to such trust if the property were conveyed to him without regard to the Act No. 391. There is no direct evidence that he knew she was the administratrix. He knew that Crow had occupied both the properties, that she succeeded him, and had mortgaged lot 6 to buy 7. But married women having property independent of their husbands is now a common thing here; and even if he inferred that she derived it from Crow, it would not follow that she took it as his administratrix; it might as probably be as his devisee. Her treatment of the property was quite contrary to her duties as administratrix—carrying on business herself, mortgaging lot 6 in order to buy 7. I do not adopt the version of either Campbell or her as to the agreement before marriage. By the Statute of Frauds it was inoperative, being verbal. Besides

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it was understood. I do not think that the document of February 9, 1882, is subject to the imputation of being improperly obtained from a woman insufficiently advised. I think she knew what she was about sufficiently, and had the powers of a proprietor under the Act 391. She had obtained the certificate, and the transfer spoke plainly for itself. Campbell's credit has been attacked, saying he deferred the transfer until Deveson's mortgage was due, and seeking it before. He says Deveson told him the mortgage would be due in 1882, and he believed him, and what proves his statement is that Deveson did, in fact, at the time of the transfer reduce interest to 6½ from 10 per cent. for the next year. If there was a contract distinctly made for the transfer of 1882 I would hold the conveyance to Campbell effectual, and protected by the Act 391, section 50, from all notices of trust. In *Chomley v. Firebrace*, 5 V. L. R. 67, a trustee being in default as to one set of persons, transferred the property which he held as trustee for another under the Act to the first set, all of his own motion, and without communicating with the principals. To compensate for his default, I held that as the transferees were innocent and might lawfully take, they were protected by section 51. The other judges differed from me on appeal. I have considered those judgments and some other cases referred to in Mr. Duffy's book upon that section, "contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such properties were registered, or shall be affected by notice actual or constructive of any trust or unregistered interest," &c., and in deference to the views of others principally am prepared to decide that the section does not apply to a transaction such as this without consideration at the time of the transfer or previous legal obligation to transfer. The nominal consideration of £5 I consider immaterial. It was introduced, I believe, according to an old habit of conveyancers in voluntary transactions, and is not, I think, a badge of fraud. It was talked of. It seems there is a usage in the Titles Office to act as to issuing certificates of transfers upon the insertion of nominal considerations. (See Mr. Duffy's book, page 119). I am unable to see any good reason for this course. Campbell has since mortgaged this property under the Act 391. I hold both defendants bound to convey those lots 6 and 7 for the trusts of the administration of Crow's estate, as to which I think it should be divided like personal estate, into three parts—two-thirds to the plaintiffs equally, and the remaining third to the defendant Campbell in his marital right. In cases of this class it is impossible to work out rights in minute detail. Campbell has been receiving the income belonging to the family, and maintaining them. I shall set them off. So as to her receiving and applying income. He should be allowed, I think, for lasting and permanent improvements on lot 7. He got possession of the furniture of Crow, and mixed it with purchased furniture. I shall hold him liable for the value of the furniture which came to his possession, and authorise him to keep that now in the hotel. I think Campbell should be directed to hold the licence for the trust. I shall order him to pay the costs of suit. His Honor made a decree accordingly.

SITTINGS IN EQUITY.

(Before His Honor Mr. Justice Molesworth.)

Re THOMAS L. SPINKS. August 11.

Reg. Gen., 23rd June, 1873, r. 6—Application for administration by creditor—The Administration Act 1872 (No. 427), sec. 36, applies only to a resisting executor—Summons issued by master calling upon executrix "within" fourteen days to show cause, &c., informal—Caveat lodged by next-of-kin who does not apply for administration to himself or oppose the application on the ground of his having a better right to administration than a creditor.

Rule *nisi* calling on Thomas H. Spinks, father of Thomas L. Spinks, late of Hotham, letter-carrier, to show cause why administration with the will annexed should not be granted to Mary Warwick, a creditor of the deceased. The application for administration was opposed on the ground that proper notice of it had not been given.

MR. A'BECKETT moved the rule absolute; MR. SKINNER showed cause.

HIS HONOR, in giving judgment, said: Thomas Longrigg Spinks made a will, October 23, 1883. By it he left some chattels to his father, Mr. Thomas H. Spinks, others to Mrs. Warwick, in whose house he lodged, and appointed Mrs. Ching, a daughter of Mrs. Warwick, his sole legatee and executrix. He died November 6. Mrs. Ching proceeded regularly by advertisement and otherwise to obtain probate through Mr. Grant, her proctor, and on December 10 the will was filed in the master's office. A difficulty arose from Mrs. Ching being a married woman separated from her husband, and his refusal to concur with the application. Thomas H. Spinks instructed Grant to obtain administration *cum testamento annexo* to him as next-of-kin, and an advertisement of such intended application was, as I take it, duly published on March 18, but Thomas H. Spinks changed his mind and withdrew Grant's authority. It was then arranged between Mrs. Ching, Mrs. Warwick, and Grant, that Mrs. Warwick should prove as a creditor, and seek administration *cum testamento annexo*. As such she did so, proved a debt before the master, and obtained an order from me on June 27 that she should be at liberty to issue out of the master's office a summons calling upon the executrix and widow if any and next-of-kin of the deceased to show cause why a day not less than 14 days after the first publica-

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tion of the summons, letters of administration *cum testamento annexo* should not issue to Mrs. Warwick as a creditor. This, I think, was the regular course under a somewhat liberal construction of rule 6 of the general orders of June 23, 1873. The provisions of the Act 427, section 36, apply as against a resisting executor only. Unfortunately the summons issued by the master was commanding "the executrix," &c. "Within 14 days after the first day of publication of this summons you do appear before this Court to show cause," &c. This was advertised in a newspaper, and in the same paper, not immediately after, was a notice that after the expiration of 14 days after the publication an application would be made "by the said Mary Warwick for administration *cum testamento annexo.*" Thomas H. Spinks, by Mr. Skinner as his proctor, lodged a caveat against Mary Warwick's application on July 10, and Mrs. Warwick, on July 17, obtained a rule *nisi* as usual against the caveator. If Thomas H. Spinks had applied under his advertisement of March 18, or had opposed the application as next-of-kin, having a better right than a creditor, he might be right, but he has left the rule *nisi* to be dealt with, refusing to admit anything (letter July 30), even putting Mrs. Warwick to the expense of proving the will by witness, and then expressed a wish to get such administration for himself. I think the rule *nisi* on the caveat should be made absolute, without costs. The caveator was, I think, misled by the manner of the advertisement into lodging a caveat, and contesting the rule *nisi* generally.

Rule absolute for the grant of letters of administration, with the will annexed, to Mrs. Warwick.

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham and Mr. Justice Holroyd).

August 12.

Exparte FAT TACK, *Exparte* AH POON.

Police Offences Statute 1865 (*No.* 265), *secs.* 43, 63—*Justices of the Peace Statute* 1865 (*No.*), *sec.* 117—*Police Offences Statute Amendment* 1872 (*No.* 532), *sec.* 4—*Where a party is convicted under sec.* 43 *of Act No.* 265, *the convicting justices may adjudge immediate imprisonment upon default of immediate payment without intervening distress under sec.* 63 *of the same Act—Where a statute authorising the infliction of a penalty either directs a levy by distress or is silent as to the mode of levying for the penalty, distress must precede imprisonment—Power of justices to award costs under sec.* 63 *of Act No.* 265.

The defendants were convicted before justices at Bairnsdale for having acted as banker and croupier respectively at a common gaming house. The justices fined the defendants, and in default of immediate payment directed imprisonment. An order was obtained to quash the convictions on the grounds that the justices had no power to direct imprisonment in default of payment of the fines.

MR. SKINNER moved the order absolute, and contended that the justices ought to have directed distress, and not imprisonment. No cause was shown.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said: The defendants in these cases were charged with an offence under sec. 43 of the Police Offences Statute 1865—the one, Fat Tack, with having acted as banker, and the other, Ah Poon, with having acted as croupier, in conducting a common gaming house in the house of Ah Mee, Pearson's-street, Bairnsdale. The defendant in each case was adjudged to forfeit and pay the sum of £20, and each conviction then proceeded in the following terms:—To be paid immediately, and also to be paid and applied according to law, and the said sum not having been paid immediately, we, in the exercise of our discretion—which discretion we hereby exercise—adjudge the said Fat Tack (or Ah Poon) to be imprisoned in the gaol at Sale, in the said colony, for the space of three calendar months, unless the said sum shall be sooner paid." We think that these adjudications are good, and are properly drawn up in accordance with the provisions of section 63 of the Police Offences Statute 1865, which have been extended to this and other offences within Part IV., by Act 532, sec. 4. Section 63 allows the convicting justices to adjudge immediate imprisonment upon default of immediate payment without intervening distress. Where such power has not been expressly given by statute, it is necessary in all cases where the statute authorising the infliction of a penalty, either directs a levy by distress, or is silent as to the mode of levying for the penalty, that distress should precede imprisonment. See section 117 of the Justices of Peace Statute 1865. We are of opinion, also, that the justices had a discretion under section 63 to award or not to award costs. The order in each of these cases will be discharged.

Order to quash conviction discharged.

RIDER V. PHILLIPS. August 13.

Local Government Act 1874 (*No.* 506), *s.* 213, *sub-sec. xvii.—Police Offences* (*Amendment* 1878), *sec.* 2—*Power of municipal corporations to make bye-laws under sub-sec. xvii. forbidding all processions other than funerals to parade or pass through the streets unless with the written consent of the mayor or town clerk.*—Per *Higinbotham, J.*: "*Questions as to the validity of bye-laws made by municipal corporations should not be entertained by justices who are called upon to enforce those bye-laws.*"

Special case stated by the justices at Prahran for the opinion of the Court. The complainant, Henry Rider, sued Ebenezer Phillips to recover a penalty of £20 which Phillips had incurred by breach of bye-law 87 of the Corporation of Prahran, in taking

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part in a procession other than a funeral without having obtained the previous consent of the mayor or town clerk. Phillips is a captain in the Salvation Army, and he and a number of others marched through Prahran three or four abreast, with music playing and banners flying. The justices at Prahran dismissed the summons on several grounds and the complainant appealed.

MR. HODGES appeared for the appellant; MR. WEBB, Q.C., and DR. MADDEN for the respondent.

MR. HODGES said that the bye-law under which the prosecution was instituted was made under section 213 of the Local Government Act, 1874, sub-section XVII. This sub-section gave the council of any municipality power to make bye-laws "for regulating traffic and processions, and generally maintaining the good rule and management of the municipality." The bye-law provided "that no procession of persons or of vehicles or of both for other than funeral purposes shall parade or pass through any of the streets, unless with the previous consent in writing of the mayor, or in his absence the town clerk of the city, and only by the route specified in such consent, nor unless and until the recipient of such consent shall have given at the least 24 hours' notice, with particulars of the consent and route, to the officer in charge of the city police." He submitted there was nothing unreasonable in that bye-law. There was nothing unreasonable in saying that before men took part in a procession they must obtain the assent of the mayor, or, in his absence, of the town clerk. The object of it was to prevent different processions coming into collision or blocking the streets. In *Hall v. Nixon*, L. R. 10 Q. B. 152, an act provided that a local body should have the regulation of buildings, and it was held that a bye-law requiring notice and plans to be given to the surveyor before the building was commenced was held to be legal. There was no more prohibition of processions under this bye-law than there was of building in the case quoted.

MR. WEBB submitted that the bye-law was bad, on three grounds. First, instead of regulating the processions it gave power to prohibit them, which an act of Parliament only could do. Secondly, that the power to regulate the processions was given to the municipality, and that body could not delegate it to the mayor or town clerk; and lastly, the bye-law was unreasonable. As to the first point, the bye-law must be general, and must apply to all cases. In this bye-law, however, the mayor or town clerk had power to refuse or consent to any particular procession, and it never was intended that power should be given. One mayor might give permission to a party of Orangemen to march through the streets, and might refuse it to the members of St. Patrick's Society. Another mayor might give permission to persons belonging to one political faction and refuse it to those of another.

MR. JUSTICE HIGINBOTHAM: I think a bye-law can be made to prohibit processions in themselves objectionable.

MR. WEBB: If Parliament chose to make a law to that effect it could do so, but a municipality could not do so. This was not regulating a procession, but allowing it to be prohibited at the will of the mayor. If the bye-law stated what streets the procession should take, or at what times they should march, that would be regulating it.

MR. HODGES, in reply, said that any bye-law regulating a procession must be more or less of a prohibitory character, and if this bye-law were held to be illegal, it would be almost impossible to frame one that would be more reasonable.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said: Case stated on an appeal from a decision of justices dismissing a complaint made against the defendant Phillips for breach of a part of bye-law No. 87 of the City of Prahran, which is in the following terms:—"No procession of persons or of vehicles, or both, for other than funeral purposes shall parade or pass through any of the streets unless with the previous consent in writing of the mayor, or in his absence the town-clerk of the city, and only by the route specified in such consent, nor unless or until the recipient of such consent shall have given at the least 24 hours' notice with particulars of such consent and route to the officer in charge of the city police." This bye-law purports to have been made under the authority of sec. 213 (sub-section XVII.) of the Local Government Act 1874, which enables bye-laws to be made "for regulating traffic and processions, and generally maintaining the good rule and government of the municipality." See also Act No. 630, sec. 2, conferring similar powers, and having the same policy. The justices dismissed the complaint upon the ground, amongst others, that this bye-law was *ultra vires*. Several objections have been urged in the argument before us against the validity of the bye-law, but they all resolve themselves into one—viz., that it is unreasonable. It has been contended that it is unreasonable that power should be given to prohibit the exercise of the right of the public lawfully to use the streets and highways of the city. We concur with the reply that has been given to this objection, that any regulation of traffic or processions necessarily implies some prohibition. To require that processions shall follow a particular route, or to confine them to particular hours of the day, is to prohibit processions by other routes and at other hours. Again it has been argued that if regulation of processions necessarily includes prohibition, the power to prohibit should be limited to certain specified kinds or classes of processions, and should not be extended to all cases (with the single exception of funerals) in which leave has not been obtained. But a bye-law so limited would be ineffectual for the purpose for which alone it was intended. It would be practically impossible to

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define or to enumerate every species of objectionable procession so as to prevent the law being evaded and defeated in those cases where it was most needed for the convenience of traffic and the preservation of order in the streets. It has been further urged that it is unreasonable to delegate to the mayor or town clerk a large power, which ought to be exercised only by the council as a large body. But this is a provision which seems to be designed for the benefit of those who may desire to form processions to which no objection could be taken. The council of the city only meets at stated times, and it is obviously proper that applicants for leave should be able to make application, and to obtain leave, if it should be granted, at any time, and with the least possible delay. Lastly, it is said that this is an arbitrary power and liable to be abused, and several illustrations of the conceivable hardships caused by the arbitrary exercise of this power by unwise or partisan officials have been suggested. The argument against the existence of a power founded upon its liability to abuse is a familiar one. It may be properly entertained in certain cases where legislation is proposed; but it has no logical value whatever, and is totally unavailing for the purposes of judicial interpretation. It assumes that which no court should permit itself to assume without positive proof, namely, that persons who have been chosen to fill positions of trust and responsibility will not discharge the duties of those positions with ordinary fairness and intelligence, and thus it becomes an argument against all official power and all authority. In *Rex. v. The Mayor and Aldermen of London*, 3 Barn. and Ad., page 255, the defendants made return to a *mandamus* that they had by ancient custom authority to examine and determine whether or not any person returned to them by the Court of Wardmote as an alderman was, according to the discretion and sound conscience of the mayor and aldermen, a fit and proper person and duly qualified in that behalf. It was contended that the custom was a bad custom, because it was liable to abuse. But the Court said, "the answer to that is that there can be no custom, no ordinance by charter, no ordinance by statute, no ordinance by any human tribunal or human authority, which may not peradventure be abused, and applied occasionally to the furtherance of improper objects. But if it were held that because a power might be abused it therefore could not legally exist, such a judgment would go to destroy almost every power which exists in this or any other country." And in the celebrated case of *Gossett v. Howard*, 10 Q. B., at p. 457, the Court of Exchequer Chamber observed, "The possibility of abuse which is urged as an objection to the power of either House of Parliament to issue its mandate in such a form" (*i.e.*, by warrant of the Speaker in a general form), "is no valid argument against its existence. If it were, it would apply equally to all the superior courts, which, without doubt, have the power of issuing theirs in the form before referred to, and it would apply also to the other admitted legal powers of these courts, which may be abused without adequate remedy." It must be assumed, we think, that the power conferred by this bye-law will only be exerted in cases where the public order or convenience may require. But if at any time it should be exerted arbitrarily or unfairly, the council, or in their default the Governor-in-Council, can repeal the bye-law (See secs. 229 and 230). On the whole, we are of opinion that none of the objections to this bye-law have been sustained, and that it has not been shown to be in any respect unreasonable. We have deemed it proper in this case to consider the arguments that appear to have influenced the justices in the Court below, and which have been addressed to us in this court. Speaking for myself alone, for my brother Holroyd does not desire to give any opinion upon this point, I think that this case may be disposed of on another and different ground. I am of opinion that it was the intention of the Legislature, expressed with adequate clearness in this act, that questions as to the validity of bye-laws made by municipal corporations—questions always easily raised and sometimes very difficult to determine—should not be entertained at all by justices who are called upon to enforce those bye-laws. The Local Government Act 1874 repealed and re-enacted with numerous alterations, the Shires Statute Act, No. 358, and the Boroughs' Statute Act, No. 359. The last-named statutes, following the legislation in the Mining Statute 1865, sec. 72, with regard to bye-laws made by Mining Boards, provide distinctly that every bye-law made under their authority should "have the force of law within the shire" (or "borough") "and shall have the same effect as if it were inserted in this act, and shall be unimpeachable in any court of justice in Victoria" (No. 358, sec. 191; No, 359, sec. 178). The absolute exemption of bye-laws from liability to be questioned, except it may be in cases of total want of jurisdiction over the subject matter, which was established by the Shires Statute and the Boroughs' Statute, is qualified by the Local Government Act 1874 now in force. The Legislature in this Act recurred to the provisions of a still earlier act than the acts of 1869, namely, Act 176, secs. 175 and 177, and while providing that every bye-law should, from the day after the day of publication in the *Government Gazette*, "have the force of law within the municipal district" (sec. 225), it gave to any resident ratepayer the opportunity, on certain terms, of testing the validity of the bye-law by proceedings in this Court (sec. 246). It is a well-established rule of law with respect to statutes that if an Act of Parliament creates a right or a power unknown to the common law and also gives a remedy or a means of enforcing such right or power, that remedy or means and no other can be resorted to.

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See *Bourne v. Jones*, 3 W. W. & A'B. (L.) 45; *M'Cafferty v. Cummins*, 5 W. W. & A'B. (L.) 73; *Reg. v. Dunne*, 3 A. J. R. pp. 110 and 118; *Wolverhampton Waterworks Company v. Hawksford*, 6 Com. B. U. S. 356, and 28 L. J. C. P. 242; *Atkinson v. Newcastle and Gateshead Waterworks Company*, 2 Ex. D., p. 441. This rule of law appears to be applicable to a bye-law as well as to a statute. See *Hunter and Another v. Aratraveld and Another*, 3 W. W. & A'B. (M.) 61, 2. I think it must be held by analogy from this rule that the right to impeach a bye-law for invalidity under the Local Government Act 1874 must be asserted by the persons and in the way prescribed by the Act, and by no other person and in no other way. I am of opinion, therefore, that the justices had no jurisdiction to entertain this objection. The determination of the justices was in our opinion erroneous in point of law, and the matter must be remitted to the justices with this expression of our opinion. The costs of the appeal must be paid by the defendant, Ebenezer Phillips. Appeal allowed with costs, case remitted to justices for re-hearing.

SOUTH AUSTRALIA.

SUPREME COURT.

IN BANCO.

(Before Way, C. J., and Boucaut, J., and Bundy, J.)

July 7.

BURNS v. THE NATIONAL FIRE INSURANCE COMPANY.

Policy of assurance—Verdict against weight of evidence—Opinion of Judge trying the case—The Court will not grant a new trial on the ground that the verdict was against the weight of evidence solely because the judge who presided at the trial was dissatisfied with the verdict if the jury found such a verdict as reasonable men might arrive at.

Appeal from the decision of Boucaut, J.

The facts will be found set out in the judgment.

WAY, C. J., delivered judgment as follows: This was an action on a policy of fire insurance tried before my learned colleague Mr. Justice Boucaut and a jury. The plaintiff's claim was for £1326 4s. 11d., and the verdict was passed for £1146 9s. 6d. There was a rule *nisi* argued before us for a new trial on the ground that the verdict was against the weight of the evidence and the damages were excessive. It was contended that the plaintiff could not recover—first, because he wilfully set fire to his premises, and secondly, because his claim was excessive and fraudulent. My learned colleague took the same view of the first branch of the case, the charge of arson, as the jury did. I think I may say that he rather leant to the plantiff's as to the claim being fraudulent, and he certainly thought the damages were excessive. Now, undoubtedly great weight must attach to the opinion of the learned judge who presides at the trial of the case when the correctness of the verdict is impeached, but the opinion is by no means conclusive, either to support or to overturn the verdict. If it were so, it would become trial by judge, and not trial by jury. This view of the law has repeatedly been supported by the decisions of this court, and they are certainly fortified by the most recent expressions of opinion of the court of Appeal in England. In the case of *Solomon v. Bidden*, 8 Q. B. D., p. 176, the Court, consisting of the late Master of the Rolls (Sir George Jessel), and Lords Justices Brett and Cotton, said that rule on which a new trial should be granted on the ground that the verdict was unsatisfactory, as being against the weight of the evidence, ought not to depend on the question whether the learned judge who tried the action was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to. And in the second hearing of the case of *Belt v. Lawes*, the present Master of the Rolls (Sir Baliol Brett) said: "The ultimate question for decision here is whether the origina verdict can, according to rule, be impeached. It can only be so if the Court is enabled judicially to say that the evidence is so clear to the contrary of the verdict that reasonable men could not fairly find as the jury has done. So that question in the present case is not what verdict this Court would have found had they been sitting as a jury, but if the jury could have fairly and reasonably found it." Applying that rule to the present case, the plaintiff's claim was attacked, first, on what amounted to a charge of arson, and the jury would not have been justified in finding against him unless the evidence in support of that plea was so strong that it would have justified a jury in finding him guilty if he had been arraigned on an information charging it as a criminal offence. The view I take of the evidence on that part of the case is one of suspicion only, and that if the jury found against the plaintiff the verdict must have been set aside. Secondly, with respect to the claim being fraudulent and excessive, undoubtedly very difficult circumstances environed, and there were many circumstances of suspicion as far as regards the plaintiff I could quite understand two reasonable men arriving at different conclusions with reference to the circumstances upon which the jury had to decide. My conclusion would have been the same as the conclusion of the jury, and, therefore, it is impossible for me to say that reasonable men could not fairly have arrived at the same conclusion as they did on that part of the case. With respect to the claim as to damages, no doubt there is a great deal of force in the very able argument that was presented to us by the learned counsel.

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MR. MANN.—And undoubtedly there are difficulties in the way of the plaintiff's view of the case. On the other hand, if it is held that the claim is not a fraudulent claim, the books support the plaintiff's case, and so far as the company's case is concerned it is exceedingly unfortunate that the gentlemen who were called in as valuators on the part of the company should have destroyed the memoranda which they made, and upon which their valuation was based; and it is equally unfortunate that a dispute of this kind being imminent and the solution of the difficult questions which had to be investigated depending so much as they did upon the state in which the premises were left, that the company should have disposed of the salvage, and thereby prevented —certainly in the utmost good faith—any of these articles from being produced at the trial, which would have assisted us very much. As I have already said, my learned colleague would have been better satisfied if the verdict had been for a less amount. I do not feel called upon to express any opinion, as the conclusion at which I arrive is, first, that the jury applying an impartial consideration to the difficult case they had before them could as reasonable men fairly arrive at the conclusion with respect to the damages as well as to the other part of the case which they came to, and secondly, that in my opinion the rule must be discharged.

CIVIL SITTINGS.

NEAYLON V. NEAYLON AND WHITE.

Registration—Specific performance—Parol contract—A. and B. were partners in a certain pastoral estate known as N., of which B. was registered lessee. B. verbally agreed to give A. the property known as N. in satisfaction of a partnership debt. A. continued in possession and improved the estate. B. assigned his interest in the lease for valuable consideration to C., who had notice of the verbal agreement between A. and B. C. registered his deed of assignment under the Registration Act.—Held, (1) *That there was sufficient part performance on the part of A. to take the case out of the Statute of Frauds*; (2) *that the Registration Act did not affect the transaction as A.'s contract was verbal and incapable of registration.* Semble, *Had A.'s contract with B. been in writing it would have been within the Registration Act, and would have been fraudulent, void, and postponed to that of C.*

Appeal from the decision of Way, C.J. The facts will be found in the judgments.

WAY, C.J.: I think no good purpose would be served by my reserving my judgment. The view I take of the case is this:—Here two brothers were in partnership in certain pastoral country, which was discovered by John, and the preferential claims to search for water on which, and the subsequent leases from the Government, were to have been taken out in the joint names of John and Tom. But Natteranuie, the particular property which is the subject of the dispute, was taken out in the name of Thomas. We find some time afterwards that John was in possession sinking a well, and living upon the property as owner. Therefore, if we look merely at the documentary title it would appear that John was a trespasser upon Thomas's property. John's act was altogether inconsistent with the documentary title. But it is competent under the decisions with respect to part performance to require what the agreement really was. And I find upon the evidence that there had been an unwritten agreement for partnership, but prior to John's going into possession there was another verbal agreement under which he had taken possession of Natteranuie as sole owner. His possession was consistent with his rights and with the arrangement with his brother, and consequently the plea of the Statute of Frauds does not apply. By the acts of the parties to which I have referred we are able to discover what the agreement really was, and I find that there was an agreement that John should have Natteranuie as sole owner freed from the partnership. What next happened was a sale by the brothers to Mr. Roediger of some country acquired subsequently. It appears that upon going into the accounts between John and Tom there was due to John, in addition to the settlement when he took Natteranuie, a sum of £800, or perhaps £1000, and it was arranged between them then that the bills to be given by the purchaser of the other property should be taken in John's name on account of the money due to him. This was consistent with the finding of the jury in the interpleader case, that the £800 from Roediger (the purchaser of the other country) was really John's money. When the documents relating to the sale to Roediger were prepared and sent up, including a transfer to John of Natteranuie to carry out the arrangement previously made between the brothers, Thomas refused to sign the transfer of Natteranuie to John. John being fearful that he would lose the £800 and Natteranuie too, said to Tom, "Give me the £800, and I will clear out." Mr. Symon argued there was not sufficient consideration to support that promise. In my opinion there was, because without considering whether the difference that then arose and the settlement of that difference would have been sufficient, the agreement on Thomas's part to take the burden of the lease would be a sufficient consideration; and if Thomas had honestly carried out that contract Netteranuie would have been his, and this action would not have been brought. But it appears he was endeavouring to obtain Natteranuie and to deprive John of the £800 as well. At any rate he was seeking to take some advantage of John, and secretly communicated with Wadham, in order that the bills which had been arranged should be made

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out in John's name, should be made out in his own name. John made preparations to give up and leave Natteranuie, and mustered and branded his cattle with a view to his departure; but before giving up possession and removing his stock John took a journey to Government Gums for the purpose of fetching up rations, so as to leave Thomas in a comfortable position, and able to carry on Natteranuie conveniently. On the way down from Natteranuie to the Gums he received a letter from Thomas that there would be no rations there. I find Thomas wanted John not to go to the Gums, but he was anxious to get him back and obtain from him an undisturbed possession. The sooner he could get John back the sooner that purpose would have been effected. That is, he would have been in possession of Natteranuie, and probably of the bills as well; and John, instead of having £800, would have been out of possession of Natteranuie, and would have had a chose in action very difficult to enforce. Fortunately for John, his suspicions had been aroused. He went to the Gums, and ascertained, by telegraphing to Wadham, all about Thomas's duplicity. He then returned to Natteranuie, and in effect said to Tom, "You have committed a breach of this agreement under which I was to have the £800 and waive my title to Natteranuie for your benefit, and I am not going to have any more to do with that agreement." And in my opinion he had a right to do that. Here was an executory agreement between the two brothers, of which Thomas had committed a deliberate breach, and John was entitled to rescind it. Accordingly he refused to give up possession of Natteranuie. He determined to insist upon his legal rights, and Thomas acquiesced in the rescissions, and left John in possession. At that time, in my opinion, the position of the parties was this:—John was entitled to the £800, the proceeds of the sale to Roediger, and was the owner of Natteranuie. With respect to the £800, that has been settled by the verdict of the jury in the trial of the interpleader. They have also found that Natteranuie was John's, and I find, as a matter of fact, the same. Then, John being the proprietor of Natteranuie, has anything happened since which deprived him of his title? The legal estate (if I may so express it) in Natteranuie remained all along in Thomas, and a lease was subsequently obtained from the Government in Thomas's name, and afterwards transferred to Mr. White. Apart from the Registration Act, it is quite clear this transfer to White was inoperative as against John. Thomas was a trustee for him. Mr. White had clear notice of John's title, and he dealt in the face of that notice with the trustee, and took a transfer of the *cestui que trust's* property. It is said there were *laches* on John's part, because all along White was insisting that John should take some steps to enforce his title to the property. But, as was properly and forcibly put by the Attorney-General, there was no duty on White's part to buy John Neaylon's property. If it was not convenient to John to commence a lawsuit against his brother, no right was thereby vested in White to acquire a title to John's property. Apart from the question of the Registration Act, I have no difficulty in finding that the equitable title to the property was John's, and that White took the transfer of it with notice of John's title, and, therefore, having obtained the legal estate in the property, he became a trustee for the plaintiff, as Tom was before. But then it is said John's title is displaced by the Registration Act. I regret that this precise point has never yet been decided. It is really *res integra*, and no doubt there is a great deal of force in the argument of Mr. Mann, that the effect of a decision in the plaintiff's favour will be to hold that a verbal agreement is more operative and more beneficial to the plaintiff than a written agreement would have been. But I agree with the learned counsel for the plaintiff that I have no right to extend the operation of the Registration Act beyond the language which the Legislature has used. In effect, the Registration Act provides that a prior documentary title not registered shall be void against a subsequent documentary title which is registered, even although the holder of the subsequent title had notice of the prior one. It is difficult to see how John could have escaped the operatiou of the Registration Act if his title, instead of being a verbal agreement, had been in writing. It is, however, unnecessary for me for the decision of this case to decide this point, and any expression of opinion would be *obiter*. All the Legislature have enacted is that a prior documentary title shall be void against a subsequent registered documentary title. They have not enacted that transactions by parol, such as these are, should be displaced by a registered title. As they have not done that, and I am here to expound and not to make the law, I must confine myself within the language of the Statute. I find, therefore, that the Registration Act affords no protection whatever to the defendant, and is no answer to the plaintiff's case. I should be very sorry, looking at it as a matter of right, if it were so, because it would be obviously contrary to good conscience and fair dealing that a person who had express notice of the plaintiff's title should be able, by dealing with a dishonest trustee, to obtain a good title against the plaintiff. I am glad I am not compelled to decide in favour of the dishonest as against the honest title in this case. I find, therefore, the subject matter of this suit—the Natteranuie run—is the property of John Neaylon, and that his title is not displaced by the defendant White's title. The decree will be that the defendants—White and Thomas—execute all necessary assurances for the purpose of vesting the property in the plaintiff. With respect to the damages done by the trespass, I find it exceedingly difficult to decide. A good deal of the damage

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claimed is somewhat remote, and I think a small sum will meet the justice of the case. For several months the defendant White intruded on the plaintiff's property and depastured his sheep on it during the shearing. In consequence the plaintiff's horses were driven away. Having regard to the facts I think the sum of £100 will not be excessive damages. The defendant Thomas will pay the cost of the suit, but failing their recovery from him they will be paid by the defendant White.

DOWNER, Q.C.: This would be a very inconvenient mode. It would necessitate unnecessary expense to recover the amount, as Thomas Neaylon has just been through the Insolvent Court.

HIS HONOR: I will give you an order for costs against both defendants, and as far as I have power I order Thomas to pay to White, because, as far as White's conduct was concerned, I do not think he was guilty of any moral fraud. He was anxious to purchase this property, the legal title was in Thomas's name, and he chose to take the risk of disbelieving John. He has now to pay the penalty, but I do not think any charge of misconduct can be made against him.

MR. H. E. DOWNER: Will your Honor say no moral fraud, no fraud of any sort?

HIS HONOR: No, I can't say that no charge of moral turpitude can be established against Mr. White in this case. As far as he is concerned, I am exceedingly sorry that his choosing to believe Thomas instead of John should have led him into this unsuccessful litigation.

IN BANCO.

[ON APPEAL.]

WAY, C.J.: We do not think it necessary to call upon the respondent. I see no reason to alter the opinion expressed by me in the Court below. The appeal will be dismissed with costs.

BOUCAUT, J.: On the question of costs I have some doubt. If there had been anything more than a mere charge of fraud deduced from the conduct of the parties to the transaction as set out in the pleadings, I would have held with Mr. Mann, and would have said that the party making such a charge should pay his own costs, and so much of the costs of the other side as were occasioned by the charge. But, as the Chief Justice has pointed out, no moral turpitude is charged. What White has done was to go in face of another man's title, and obtain a title for himself, and the other side has charged that as a fraud and conspiracy between him and Wadham. But, seeing that White has been acquitted of any actual moral turpitude, and that the charge practically means nothing further than the law would imply, or was generally stated in the old Equity pleadings, I do not think it necessary for me to differ from the learned Chief Justice in the Court below, who gave no costs in respect of this charge, and whose attention was not then called to this question. Therefore I proceed to the merits. The appellant here, James White, —and this governs me somewhat in the whole consideration of the case—stands upon a strict legal and technical title, and claims, by reason of that title, to get rid of an undoubtedly clearly established equitable title on the part of John Neaylon. Of course, if Mr. James White had clearly established the proposition that the Court is bound to set at naught John Neaylon's equitable title, I would have given him his legal rights, however reluctant I might feel to destroy John Neaylon's equity, but I do not think that is forced upon me, and I see nothing in the case to make me diligently search to help James White at all in the matter. Now, what is John Neaylon's position? It was admitted by Mr. Henry Downer, for Tom was rightly entitled as a partner, and it is so proved by the evidence; and the Chief Justice adopted that view at the trial. The Chief Justice held further that there was a contract between John Neaylon and Tom Neaylon, by virtue of which John Neaylon was in possession, and did certain acts as purchaser of Natteranuie, which possession John Neaylon would not have taken, and which acts he would not have done as partner. It seemed to the Chief Justice, and it seems to me also, that the partnership was simply for buying and selling those claims for runs —a speculation, in fact, in buying and selling, and not a speculation in farming or carrying them on. Not only did the Chief Justice find that this contract for the sale of Natteranuie to John was proved, but there is the express verdict of the jury on the trial of the interpleader in the Common Law actions finding the same thing; and that is my opinion also. Necessarily the agreement for the purchase by John was subsequent to the partnership, because John Neaylon was a partner immediately the claim was taken out—he was a partner in the firm for acquiring and selling these speculative claims for leases. At the time of the contract with White John Neaylon, therefore, was in my opinion undoubtedly entitled to enforce against Tom Neaylon his rights as a purchaser. Then it is said that there was a rescission of the contract between John and Tom, under which John Neaylon was entitled to Natteranuie. I adopt the view of the Chief Justice, that there was a conditional contract between John and Tom for the rescission of the contract for sale, but that conditional contract for rescission was never carried into effect. In short, there was an executory contract never executed upon a condition which was never performed. There being disputes between the brothers John thought that Tom was trying to get the better of him, and said in effect, "I claim Natteranuie. I am entitled to it. I claim the £800 as my share of the partnership. I am entitled to that also; but rather than go to law I will take the £800 if you will give me the bills, or have them made out in my name." Having made this offer, and said he would

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give up and leave Natteranuie if he got the bills, John went to Government Gums to inquire into the matter and see if he could get the bills, but he found instead of being made out in his name, that they were made out in Tom's name, and that the consideration for the rescission, which he had offered to accept, could not, therefore, be given to him. Therefore, John was justified in saying that he would not carry out the proposed rescission. So far from Mr. Tom Neaylon honestly performing the condition, and carrying out the accord and satisfaction he had agreed upon, he was all the while intriguing against John, and endeavouring to get John out of Natteranuie, and to deprive him out of the bills, too. Therefore, John could not trust him, and was justified in standing on his rights, which were to have Natteranuie under the agreement, and also to have his share of the balance of the partnership property. He was prevented by Tom in a fraudulent manner from being able to carry out this conditional contract for rescission; he was driven to an action at law, and the verdict of the jury was that Natteranuie and also the £800 were his, so that, as between the brothers, Tom had no color of a title to exclude John from Natteranuie; but on the contrary, John had a right to possession and was in possession of Natteranuie as his own. That being the case, White appears on the scene, and of course that complicates matters. John Neaylon's right was under a verbal contract coupled with possession. Undoubtedly, if John Neaylon's contract had been in writing he would have been out of Court. Mr. James White would have an unanswerable claim by virtue of the Registration Act which would have made such written contract between John and Tom fraudulent and void as against the subsequent assignment to James White if registered. But the contract between John and Tom, although verbal, was upon good consideration, and was part performed; and the question is, can it be enforced against White if he had notice? Had he notice? The Chief Justice found that he had. He said he believed John Neaylon in preference to Mr. White, junr., in this particular. John says he told Mr. White, junr., that Natteranuie was transferred to him (John) in place of his share of Primrose Springs, and that he explained everything to him, and it is quite clear to my mind that he did explain the whole matter, for there is the document drawn out by Mr. White, junr., regarding the man Hester. It would be absurd to suppose that John Neaylon—who could not read and write, and had no experience of business or office transactions—could have devised this plan. It is just such a scheme as would be devised by a man like Mr. White, junr., experienced in land and office transactions, and who could not have known enough of the facts to have devised such a plan unless John Neaylon had fully explained his position. That being so the case is taken without that of *Jolland v. Stainbridge* (3 Ves. Jr. 478), cited by Mr. Mann, which, at first sight, seemed the other day. In that case there was only a general rumour, a vague, indeterminate threat from persons who thought they had a title, and had not a direct interest, and which was, therefore, held not sufficient to oust the purchaser, or put him on enquiry. But in this case it is no vague rumour; there was full and precise information of the circumstances given by the very person claiming, and full and precise notice to the person buying. I must say that a man who, after such definite notice as that, chooses to buy over the head of the person rightly entitled, cannot come into a Court of Equity and require the Court to set aside the title of the honest owner of the property. The whole of the transactions, the correspondence, and Mr. White's adroit endeavours to make the parties interplead, satisfy me that he knew John Neaylon's position and rights perfectly well, and, therefore, the notice to James White is abundantly sufficient. As to the Registration Act, if I did not know well what had been the long practice of conveyancers I would have liked to have gone through the cases cited by Mr. Mann, and considered the bearings of his argument more fully, but unless I was clear that Mr. Mann's view was right, the long and universal practice of conveyancers in the colony under the Registration Act ever since its passing would lead me to say, as I do say, that the view of the matter that has prevailed with the profession and with every judge of this Court for forty years must be maintained until the Privy Council overrules it. Without elaborately going through Mr. Mann's argument, I say that the people have been advised, for instance, as to equitable mortgages that deposits of deeds were safer by parol than by writing, because if by writing they must be registered, and if not they could not and need not be registered. That advice has always been acted upon, and many titles have been taken and maintained on that view of the Act, and the case of *Kettlewell v. Watson* (46 L. T. N. S. 83, 51; L. J. 281 Ch.), reference cited by the Attorney-General, supports this view. Mr. Mann said the policy of the Act was to the contrary, but I do not think so. The statute only says that the first contract, if in writing not registered, is to be postponed to the second contract in writing if registered. It follows almost as of course from the words of the Statute that it is not to be postponed if not in writing, because it cannot be registered. The words of the Statute are:—"All deeds, conveyances, or contracts in writing." This is not in writing, and, therefore, is not within the words of the Statute. Mr. Mann frankly concedes this, but seeks to drive us into the preamble in order to extend the express words of the Act. The preamble says:—"To prevent secret and fraudulent conveyances, and to provide means whereby the title to real property may be more certainly known." Admitting this, the Act goes on to show how this is to be done, and provides

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means by which the title is to be known and what sort of titles. I do not think the words of the preamble can enlarge the express words of the Act upon this. Therefore, bearing in mind the universal view of conveyancers for forty years, I hold that if a contract not in writing is sufficiently performed and enforceable between two parties, and another person chooses to buy from one of those parties with express notice of the contract and of the other party's rights and position, then the party so buying must take the consequences. For these reasons I am of opinion that the appeal must be dismissed.

ANDREWS, J.: The appeal in this case is *inter alia* on the following grounds, viz.: That there was no contract in writing for the sale of a "run" called Natteranuie between the plaintiff, John Neaylon, and the defendant, Thos. Neaylon, to satisfy the Statute of Frauds, and that there was no unequivocal taking of possession of the run and part performance of a verbal agreement to take the contract out of the Statute. The appellant also argued that if there was a verbal agreement for sale of the run, such contract had been rescinded. The notes of the evidence given at the trial satisfy me that there was a verbal contract for the sale of Natteranuie to the plaintiff; that he entered into possession and partly performed the agreement by the expenditure of money and labour in valuable improvements on the land. These acts were most unequivocally done in respect of the agreement, and were sufficient to take it out of the Statute of Frauds. As to the rescission of the verbal contract, the evidence clearly shows that at most there was a proposal to rescind it, but the plaintiff attempting to act on the proposal, he was met by fraudulent conduct on the part of the defendant, Thomas Nealyon, and no rescission, in fact, took place. The plaintiff, John Nealyon, continuing to act on the former verbal agreement, remained in possession of Natteranuie run and continued the part performance otherwise of the verbal agreement by valuable improvements made both by labour and expenditure of money on the land. It appears also, from the evidence at the trial in the Court below, that after the verbal contract the part performance of it by the plaintiff, the defendant, Thomas Neaylon, assigned by deed the lease of the run (which was in his name) to the appellant (defendant White), who caused such assignment to be duly registered under the Registration Act, No. 8, 1841. The appellant then urged that there was no evidence of notice to White of the verbal contract, and if there was, by the provisions of the last-named Act the transfer of the run by deed registered gave him priority of title, and the verbal contract was therefore, in the words of the Act, "fraudulent and void at law and in equity." The Chief Justice, however, has found that the appellant had notice of the verbal contract and of the particulars of the transactions in relation to it between the plaintiff and defendant, Thomas Neaylon, before the lease was assigned to the appellant, White. In my opinion there was sufficient evidence to support such finding, and as the Registration Act, No. 8, of 1841, Sec. 3, deals with contract in "writing" only, the verbal contract was not rendered fraudulent and void by reason of the registration of the deed of assignment by the appellant. I think, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

DOWNER, Q.C., SYMON, Q.C., and C. C. KINGSTON, for plaintiff; MANN, Q.C., H. E. DOWNER, and J. W. BELT for White; the defendant Neaylon was not represented.

IN CHAMBERS.

(Before His Honor Mr. Justice Williams.)

Sept. 2.

SIMMONS v. HALL AND ANOTHER.

Rules of Supreme Court, Order XXXVI., r. 6—In all applications for trial with a jury an affidavit is necessary stating the nature of the action.

Application under Order XXXVI., r. 6, that the action should be tried with a jury. The application was made with the consent of the opposite party, but no affidavit was filed setting forth the nature of the action.

HIS HONOR said: In all applications for trial with a jury I shall require an affidavit stating the nature of the action. If the action were one involving an examination of accounts, I certainly should not grant an application of this kind.

Solicitors for applicant, *Gillott* and *Snowden*.

RUDDUCK v. CLARKE. Sept. 2.

Rules of Supreme Court Order XIX., r. 4.—Appendix C., sec. 7, No. 2—Rules of Supreme Court, August 1884, rr. 6 sub-sec. A, 7—Statement of claim not in accordance with rules—Action for recovery of land—Costs.

Application on behalf of the defendant that the plaintiff's statement of claim may be ordered to be amended or struck out on the grounds that it tends to prejudice, embarrass, or delay the fair trial of the action, and on the further grounds that it is not in compliance with Order XIX., r. 4, and that the defendant have 10 days further time to deliver his defence after such amendment, and that defendant's costs of and occasioned by such amendment or striking out and of this application may be referred to be taxed, and when taxed be paid to the defendant. The action was brought for the recovery of land. The statement of claim was as follows: "The plaintiff is entitled to recover possession of Crown allotments 5 and 6, section 14, Town and Parish of Dandenong, County of Bourke. The plaintiff claims possession."

It was contended on behalf of the defendant that the statement of claim was insufficient (Order XIX., r. 4; Appendix C., sec. 7, No. 2; *Phillips v.*

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Phillips, 4 Q. B. D. 127; *Harris v. Jenkins*, 22 Ch. D. 481; *Davis v. James*, 32 W. R. 406; *O'Connor v. O'Hara*, 8 L. R. (I.) 247. No cause was shown.

His Honor said: I have no doubt this state ment of claim is not in accordance with the rules. I grant the application.

Application was then made under Rules of the Supreme Court, August 1884, r. 7, that the costs of and occasioned by the striking out, and of this application should be taxed on the higher scale, on the ground that rule 6, sub-sec. A., only applied to actions in which a sum of money is claimed in the nature of a debt or damages, whereas in this case the recovery of land was sought.

His Honor said: I do not think this new Rule (Rule 6, sub-sec. A.) applies to actions in ejectment. I allow this application.

Solicitors for defendant: *Crisp, Lewis* and *Hedderwick*.

Robertson v. Brown. Sept. 3.

County Court Statute 1869 (*No* 345), *sec.* 43—*Application for security for costs or for remission of action to County Court after issue joined—Time when such application ought to be made.*

Summons on behalf of the defendant calling upon the plaintiff to show cause why further proceedings in this action should not be stayed until the plaintiff shall have given security to be approved of by the Prothonotary for payment of the costs of the defendant in this action; or otherwise why this action should not be remitted for trial to the County Court.

Mr. Walsh in support of the summons.

It was contended on behalf of the plaintiff that the application was too late as issue had been joined in the action.

His Honor said: I shall not grant any of these applications where there has been delay, as in the present case, unless the delay is explained. I will grant the application in this case as there has been a decision on the subject. The proper time to make an application of this nature is immediately after the service of the writ, and before any pleadings are delivered. The defendant to pay the plaintiff's costs.

Solicitors: For plaintiff, *Daly*; for defendant, *Maddock*.

Smith v. Scott. Sept. 5.

Where after action commenced the defendant tenders the amount of the debt to the plaintiff, the defendant must, at the same time, tender to the plaintiff's attorney a sum of money as payment for his costs—The fact that the plaintiff's attorney demands an exorbitant sum as payment for his costs will not exonerate the defendant from this duty.

Summons on behalf of the defendant calling upon the plaintiff to show cause why, on payment of the amount of the debt with the costs, all proceedings herein should not be stayed. In this case the writ of summons had been issued, but had not been served on the defendant. The affidavits disclosed that the amount of the debt had been tendered to the plaintiff's attorney, that he declined to receive it unless £5 were paid to him as costs, and that the defendant's attorney was always willing to accept service of the writ, but was never asked to do so.

In answer to a question of His Honor, it appeared that no sum of money had been tendered to the plaintiff's attorney as payment of his costs at the time when the amount of the debt was tendered to him.

Mr. Walsh, for the plaintiff, was not called upon.

His Honor said: I must dismiss the summons on the ground that no tender has been made to the plaintiff's attorney as payment for his costs. I will allow only one guinea costs, as I think the demand of £5 as costs for the issue of a writ was simply exorbitant.

Solicitors: For plaintiff, *Hitchins*; for defendant, *Hopkins*.

Rudduck v. Clarke. Sept. 8.

Common Law Procedure Statute 1865 (*No.* 274), 420—*Judicature Act* 1883 (*No.* 761), *secs.* 36, 41—*Rules of the Supreme Court, Order XXXVIII., Rule* 10—*Order LIV., Rules* 4*, 10—*Order LXIV., Rule* 11—*Order LXVI., Rule* 7 (*m.*)—*Order LXX., Rule* 1—*Power given to Rules of Supreme Court by secs.* 36, 41 *of Act No.* 761—*Sec.* 420 *of Act No.* 274 *repealed by Order LIV., Rule* 4*—*Affidavit must show on whose behalf it was filed—Summons not required to be signed by a judge or in a Judge's name.*

Summons on behalf of the plaintiff calling upon the defendant to show cause why an order of Mr. Justice Williams should not be set aside on the grounds, 1st, that the copy of the summons upon which the order was made was not signed by a judge, and 2nd, that the copy summons was served upon the plaintiff's attorney after the hour of two o'clock on the day previous to the date at which by the said copy it was directed that all parties should attend the judge in Chambers.

The order was to the following effect (see ante p. 45): That the plaintiff's statement of claim be struck out, and that the defendant's costs of and occasioned by the said striking out and of the application be taxed, and when taxed be paid to the defendant on the higher scale.

Two preliminary objections were raised on behalf of the defendant to the form of the affidavit filed in support of the summons. 1st, That it did not show on whose behalf it was filed in accordance with Order XXXVIII., r. 10; and 2nd, that the folios were not numbered in accordance with Order LXVI., r. 7 (*m.*).

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His Honor upheld the first objection but allowed the affidavit to be amended under Order LXX., r. 1; and dismissed the second objection on the ground that Order LXVI., r. 7, did not apply to such an affidavit as this, which was not required to be printed.

Mr. Stephen, in support of the summons, contended that it was necessary for a summons to be signed by a judge (Order LIV., r. 10); and that a copy should be served before two o'clock (Order LIV., r. 4*).

It was contended on behalf of the defendant that as sec. 420 of the Common Law Procedure Statute was not repealed by the Judicature Act, the Statute would override the rules, and consequently that three o'clock was the time before which summons should be served; and further that Order LXIV., r. 11, providing four o'clock for the service of summonses, &c., was at variance with Order LIV, r. 4*; and also that the summons was in conformity with Appendix K., Form 1, and was not required to be signed by a judge or in a judge's name.

His Honor, in delivering judgment, said: This is a somewhat important case, and involves some nice points. The application is made to set aside an order that I made on the 2nd September, striking out a statement of claim and allowing certain costs, and ordering the way in which certain costs should be taxed. The application is made on two grounds. First—That the copy of the summons upon which the order was made was not signed by a judge, and second, that such copy was not served upon the plaintiff's attorney until after two o'clock on the day previous to the return of the summons. With regard to the first ground, I think that as Order LIV., r. 10, provides that these summonses shall be in the form No. 1 in Appendix K., and as Appendix K. does not provide for the name of a judge or the signature of a judge, these summonses are not required to be signed at all either by a judge or by the associate in his name. The second ground, namely, the time for the service of the summons involves two points of some importance. (1.) Whether Order LXIV., r. 11, and Order LIV., r. 4*, can be read together. As to this, I think they can, as Order LXIV., r. 11, in my opinion, only fixes the hour for the purpose of computation of time, and does not affect the purpose of Order LIV., r. 4*; and (2.) whether as the Common Law Procedure Act, sec. 420, requires summonses to be served before three o'clock, and Order LIV., r. 4*, under the Judicature Act, on the other hand, requires service to be made before two o'clock of the day previous to that on which the summons is made attendable, the unrepealed section of the Statute or the Rule is to prevail. Under these circumstances, with much doubt, I think the decision of Mr. Justice Higinbotham in *Wilson v. Turnbull* (unreported), which has been pressed upon me in argument, is right, namely, that where an unrepealed section of the Common Law Procedure Statute is at variance with a rule made under the Judicature Act, the unrepealed section of the Statute is to prevail, and, if so, service of the summons before three o'clock is a good service. If this be not so, the objection would be a good one under Order LIV., r. 4*, though possibly under Order LXX., r. 1, I might even in that case, after hearing the other side as to the validity of my order, allow it to stand. I dismiss the summons with costs. Costs to be taxed.

On the next day His Honor referred to his decision in this case, and said: When this case was before me yesterday my attention was not called to, nor was I aware of secs. 36 and 41 of the Judicature Act. I decided yesterday that in so much as sec. 420 (unrepealed) of the Common Law Procedure Statute was at variance with Order LIV., r. 4*, the unrepealed section of the statute should prevail. On looking, however, into these sections of the Judicature Act, I think my decision on this point was erroneous. These sections are very strong and sweeping, and, in my opinion, as to procedure at any rate, clearly make the rules prevail against all or any unrepealed enactments of a statute. I think, therefore, that Order LIV., r. 4*, is in full force and effect, and that the summons on which the order was based was served too late. Such being the case, I ought to have given the plaintiff's attorney an opportunity to be heard on the summons on which my order striking out the statement of claim was based, and I certainly should not have refused his application to set aside that order with costs.

His Honor directed that the plaintiff's attorney should be informed that he would be heard against the first order and also as to the refusal with costs of his application on the following morning in Chambers.

The plaintiff's attorney appeared next morning and stated that, on consideration, he was of opinion that his statement of claim was insufficient, and applied that it should not be struck out but that leave should be given him to amend it.

His Honor then made the following order: It is ordered that the application made by the said summons be refused; that the defendant do pay to the plaintiff the costs thereof, such costs to be taxed; and that the plaintiff be at liberty to amend his statement of claim herein as he may be advised within one week from the date hereof.

Solicitors: For plaintiff, *Stephen*; for defendants, *Crisp*, *Lewis* and *Hedderwick*.

PRACTICE COURT.

(Before His Honor Mr. Justice Higinbotham.)

August 29.

In the matter of the election for the West Riding to the Shire of Pyalong.

Re Cordell, *Exparte* Walsh.

Local Government Act 1874 (*No.* 506), *secs.* 71,

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116—*Schedule* 10 — *Application under sec.* 71 *of Act No.* 506 *is not the proper proceeding where a councillor declared duly elected has not taken his seat or has not done some act which would have the effect of filling the seat—What is a sufficient signature to a nomination paper under sec.* 116.

Application for rule *nisi* under sec. 71 of the Local Government Act 1874, calling upon Cordell to show cause why he should not be ousted from the office of councillor of the West Riding of the Shire of Pyalong. At the last elections Cordell and Walsh were the only candidates nominated. The returning officer posted Walsh's name as a candidate, but afterwards declared Cordell duly elected as being the only candidate nominated in accordance with the 116th section of the Local Government Act 1874. The nomination of Walsh was in the usual form, but the portion signifying his consent to become a candidate was to the following effect:—"I, the abovenamed David Walsh, do hereby consent to such nomination." This was not signed, but the words "David Walsh" were written by him.

Dr. Madden, in moving for the rule, submitted that this was a sufficient signature, that the returning officer should have held a poll, and that Cordell had been improperly declared elected (*Reg v. Oddie*, 6 W. W. & a'B. (L.) 221; *Reg v. Peck*, 4 A. J. 117).

His Honor, in giving judgment, said: I agree that this is a sufficient signature. The affidavit, however, merely states that Cordell claims to be duly elected. That statement is not a sufficient ground for this application. Until some act has been done the office is not full, and until the office is full this is not the proper remedy. It may be that before Cordell takes his seat he may re-consider the matter. The proper proceeding in this case is by way of *mandamus* to compel the Council to hold an election. I refuse the application.

Solicitor for applicant, *Best*.

Probate Jurisdiction.

(Before His Honor Mr. Justice Molesworth.)

In the Will of Armstrong. Sept. 11.

Will—Probate granted to a will as altered where the alterations are unimportant.

The testator left a holograph will in which there were uninitialed alterations. The only one of the attesting witnesses who could be found swore that the alterations were in the handwriting of the testator, but could not say whether they were made before the execution of the will or not. The testator appointed his wife sole executrix if she should survive him, and in case of her death during his lifetime he appointed certain others as his executors. It was in the clause appointing these others provisional executors that the alterations occurred.

Mr. Woolf moved for probate of the will, with the alterations, to the widow. The testator being a barrister would know that alterations in a will must be made prior to the execution. The alterations occur in a part of the will which is inoperative, as the executrix has survived the testator (*In the will of Stephen*, 7 V. L. R. 69 I. P & M.)

His Honor said: I think the alterations are unimportant. I will grant probate of the will as altered.

Proctors for applicant, *Taylor, Buckland*, and *Gates*.

In the Will of Naylor. Sept. 11.

Administration de bonis non *granted to the administratrix of an executor, where the executor was sole legatee under the testator's will.*

The testator died, leaving a will by which he appointed one Fennell sole executor and sole legatee. Fennell died intestate without having administered the whole property, and his widow took out administration to his estate.

Mr. Woolf moved for administration *de bonis non* to the administratrix.

His Honor granted the application.

Proctors for applicant, *Macgregor* and *Brahe*.

Sittings in Equity.

(Before His Honor Mr. Justice Molesworth.)

Richardson v. Shirra. August 28.

Will—A gift of certain houses will include a vacant piece of land which had been used with one of the houses—Where a cestui que trust *is of age the Court may direct that his share be paid to him by the trustee.*

This was a suit for the administration of the estate of Archibald Shirra, and to obtain the opinion of the Court on the interpretation of his will.

Mr. Higgins for the plaintiff; Mr. Gregory, Mr. a'Beckett, and Mr. Weigall for the defendants.

His Honor said: Mr. Archibald Shirra made a will October 12, 1882. After payment of all his just debts and funeral and testamentary expenses, he gave to his brother John, then residing at Glasgow, the sum of £500, to be for his sole use and benefit, and £500 to be divided amongst his five children then residing with him; also £1000 to be divided equally among the five children of his sister, namely, Grace Shirra, wife of Mr. Thomas Felton, Glasgow. (There is some confusion of words.) He also left to Jane Shirra, his wife, the rents and profits of the land and property numbering 371 and 373 Nicholson-street, Carlton, in the city of Melbourne, also the rents and profits of the property numbering 260 Cardigan-street, Carlton, and appointed Mrs. Richardson executrix and Mr. Watson executor of his will. By a codicil executed at the same date, he said, "that the before mentioned property shall, so long as she remains my widow, but at her death or if she marries again the whole of the land and property shall be sold by public auction, and divided equally among my brother's and sister's children at present residing with him

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in Glasgow, and 2½ per cent. be given to the trustees of the aforesaid will for their use and benefit." £50 was given for a tombstone and the purchase of a family burying place. Testator died March 25, 1883, leaving a brother not referred to in the will; his widow; John Shirra, his brother, having five children living with him in Glasgow, and five children of his deceased sister, Grace, married to Mr. Felton, living at Glasgow, but not with John Shirra. I think that as to the legacies of £500 and £1000 to John Shirra, he was made a trustee for the five children of himself and the five of Grace Felton, and the legacies might properly be paid by the executors to John Shirra, but as two of the Feltons made parties are of age, and insist that their shares of the £1000 should be paid to themselves, I shall so direct. Testator had a block of land between Nicholson-street and Station-street. On it were houses numbered 371, 373, Nicholson-street, one of which he inhabited when he made his will. The two houses filled about half the frontage to Nicholson-street, and went back about half-way to Station-street, and were about a fourth of the block. A small portion of the vacant space had been but had ceased to be used with one of these. I think from the language of the will and codicils that the ground occupied by these two houses was left to the wife during viduity, and to be sold at her decease, and that the rest of the block was not disposed of. I shall declare as above. Direct that the trusts of the will and codicils should be carried out under the direction of the Court. I shall order that it be referred to the chief clerk to make the following accounts and inquiry:—(1.) An account of the personal estate not specifically bequeathed of the testator, Archibald Shirra. (2.) An account of testator's debts. (3.) An account of testator's funeral expenses. (4.) An account of the testator's legacies given by his will. (5.) An inquiry what parts of his personal estates are outstanding and undisposed of. It is ordered that the testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses in due course of administration, and it is ordered that the following further inquiries and accounts be made and taken, that is to say: (6.) An inquiry of what real estate the testator was seised of or entitled to at the time of his death; also an inquiry what incumbrances affect the said testator's real estate. And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised, and that further proceedings, so far as relates to the form and manner of procedure, be continued and concluded as if commenced after the commencement of the Judicature Act.

SITTINGS IN BANCO.

(Before Mr. Justice Higinbotham and Mr. Justice Holroyd.)

WARD V. HEARNE. August 12.

New trial—Conditions under which the Court will grant a new trial on the ground of discovery of fresh evidence.

Rule *nisi* for a new trial. The plaintiff recovered a verdict against the defendant for £200 for injuries he had sustained by the defendant's negligence. The new trial was applied for on the ground that the defendant had, since the trial, discovered fresh evidence.

MR. PURVES and MR. MITCHELL moved the rule absolute; DR. MADDEN and MR. HAMILTON showed cause.

MR. JUSTICE HIGINBOTHAM in delivering the judgment of the Court, said—Rule to set aside the verdict obtained by the plaintiff for £200 and for a new trial on the ground that the plaintiff has since the trial discovered fresh evidence in support of his case. Applications of this nature are viewed with disfavor by courts of justice, and it was not without some hesitation that we granted the rule. Few applications of this kind are recorded, fewer still have been granted; and it is evident that any relaxation of a long established practice with reference to such applications would not only tend to produce less care and diligence in the preparation of causes for trial, and would, as the Court observed in *Goldsbrough v. M'Culloch* (5 W. W. & A'B. (L.), p. 154), make it difficult to refuse a new trial in any instance where the case had been badly got up, but would also increase in a serious degree the risk and temptation to perjury. It is the duty of the Court, therefore, in all cases like the present to proceed with more than usual caution before it annuls the finding of a jury, and to insist upon strict compliance by the applicant for a new trial with at least the following conditions:—First, it must be shown clearly that the new evidence was not in possession of the party applying, and could not by proper diligence have been procured by him at the time of the first trial. Secondly, it must appear that the newly discovered evidence is such as ought, if it had been brought forward at the first trial, to have led the jury to come to a different conclusion from that at which they have arrived. Now, we are not satisfied that the defendant in this case has complied with either of those conditions. As to the first, it appears that the defendant knew there was a lorry on the spot at the time of the accident, and he believed that it belonged to one or another of the breweries at the west end of the city. He states in his affidavit in general terms, and without giving times or other particulars, that he caused inquiries to be made by his solicitors and by friends, as well as by himself personally, at several of the breweries in Melbourne, and particularly at M'Cracken's Brewery and Terry's West-end Brewery, with a view to

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find the lorryman. Subsequently to the trial it was discovered that this new witness had been actually employed at the last-mentioned brewery for nearly two months after the defendant knew that the plaintiff was about to bring his action, and down to about the time that issue was joined. If the minute inquiries which ultimately led to the discovery of the lorryman had been made in proper time we think it can hardly be doubted but that they would have been successful. The defendant has failed, we think, to show that he used due diligence to procure the evidence of this witness. Neither is it clear to us that the jury would have been bound, as reasonable men, to find a verdict for the defendant if the lorryman had been called at the first trial. His evidence relates indeed to a very material point in the case, and if he had succeeded in discrediting the plaintiff, and had convinced the jury that there was a lorry on the spot—a fact which the plaintiff denied—his evidence would certainly have gone far to establish the defendant's case. But the jury would not be bound to accept his story, unsupported as it is by any other witness of the accident except the defendant. They might have believed the plaintiff as against both the defendant and the lorryman, and there were no collateral facts, and there was no further corroborating evidence that would render such a conclusion manifestly and wholly unreasonable. We are of opinion, therefore, that the rule should be discharged.

Rule for a new trial discharged.

JOHNSON v. UNION FIRE INSURANCE COMPANY OF NEW ZEALAND. August 12.

Insurable interest.—A legal mortgage of a personal chattel may be made without a deed—What is sufficient to create an insurable interest—A person having himself an insurable interest can enter into a contract whereby the insurable interests of other persons in the same property shall be protected, provided he intend to protect them at the time the contract was made.

Rule *nisi* to enter a nonsuit or to reduce damages. The action was brought by Charles Johnson, of Corowa, to recover a sum of £600 on a policy of fire insurance over a steam-engine and excavating machine. The jury found for the plaintiff, and the nonsuit was applied for on the ground that the plaintiff had no insurable interest in the machine, and it was also contended that, if he had any interest, it was only to the amount of £400; and the verdict should be reduced to that amount.

MR. PURVES and Mr. HODGES moved the rule absolute; DR. MACKAY and DR. MADDEN showed cause.

Mr. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said,—This is an action on a policy of insurance against fire of a steam-engine and an excavating machine combined, in the sum of £600. In a second count the plaintiff claimed a return of the premium. The defendants pleaded as to the first count that the plaintiff was not, at the time of the alleged loss and damage, interested in the machine, and to the second count they paid the amount of the premium into court. It appeared at the trial that the plaintiff lent one Milthorpe £400 to enable the latter to buy the machine, the actual value of which was proved to be £800 or upwards. Milthorpe told the plaintiff that he should have the machine as security for the repayment of the amount lent by him. Milthorpe desired to insure the machine, signed the proposal, and gave his cheque for the premium. The plaintiff, who was the agent of the defendant company, forwarded the proposal, and with Milthorpe's consent caused the policy to be issued to him in his own name. Milthorpe got and retained possession of the machine, and used it until it was destroyed by fire. The jury found that the plaintiff was interested in the machine to the amount of £400, and that it was his intention to insure both his own interest to that amount and also the interest of Milthorpe in respect of the remaining £200, and they returned a verdict for £600. This rule was obtained pursuant to leave reserved at the trial to set aside the verdict and enter a nonsuit, on the ground that the plaintiff had no insurable interest in the machine, or, failing that, why the damages should not be reduced, on the ground that the evidence disclosed and the verdict established that the plaintiff was only interested to the extent of £400, and only suffered damage to that extent. We have derived much assistance from the exhaustive and able arguments addressed to us in this case. With regard to the first ground of the rule, the case of *Flory v. Denny*, 7 Ex. 581, was the authority chiefly relied on by the plaintiff. The earliest recorded case in which *Flory v. Denny* was cited in the Supreme Court appears to be *Raleigh and Others v. Jacomb*, March 31, 1860. Since that time *Flory v. Denny* has been more than once quoted in argument, and its authority has never yet, so far as we are aware, been called in question either in this court or in any English court of common law. See *Goldsbrough v. M'Culloch*, 5 W. W. & A'B. (L.), p. 154; *Fitzgerald v. Jacomb*, 4 A. J. R. p. 189; *Cohen v. M'Gee*, 4 V.L.R. (L.) p. 543. See also *per* Williams, J., in *Maughan v. Sharp*, 34 L. J. C. P., p. 19. *Flory v. Denny* must now be taken to be an approved authority for the proposition that a legal mortgage of a personal chattel may be made without a deed. And as it was proved at the trial that according to the law of New South Wales, where the contract in the present case was made, a contract for the mortgage of a chattel need not be in writing in order to be valid between the immediate parties to it, we think that the jury were justified in finding upon the evidence adduced that the plaintiff derived from his verbal agreement with Milthorpe a legal interest by way of mortgage, and

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consequently an insurable interest, in this machine. In stating this conclusion, we must not be understood to intimate that a legal interest in a chattel is necessary, in our opinion, in order to create an insurable interest in a person insuring the chattel. An equitable assignment based upon a loan or advance might be sufficient, we think, to confer an insurable interest upon the person advancing money. See *Wilson and Another v. Martin*, 11 Ev. p. 684. The most recent authority, *Stock v. Inglis*, 12 Q.B. Div., p. 504, appears to show that a liability in respect of goods arising out of a contract, without either property, actual or constructive, or possession, is sufficient to create an insurable interest in the goods for the person so liable. Either "a right in the property or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possessions or enjoyment of the party," is sufficient, according to the authorities, to constitute an insurable interest. See per Lord Eldon, in *Lucena v. Crawfurd and Others*, 2 Bos. and Pul., New Reports, at page 321. We are of opinion for these reasons that the defendants have failed to support the rule upon the first ground. We think that the defendants have been unsuccessful also in the attempt to show that the damages ought to be reduced. The contract of insurance is a contract of indemnity, and there is no legal principle which forbids a person having himself an insurable interest to enter into a contract whereby the insurable interests of other persons in the same property shall be protected, provided he intends so to protect them at the time the contract is made. The terms of the contract itself, or in certain cases the provisions of the statute law, may impose restrictions upon the exercise of the right of one person having an interest to insure for the benefit of others interested in the same property. A policy on a life or other event, not being a *bonâ fide* insurance on ship's goods or merchandise within section 48 of the Instruments and Securities Statute 1864, must, according to section 46 of that statute, have inserted in it the name or names of the persons interested therein, or for whose use, benefit, or on whose account the policy is made, and if this requirement is not complied with the policy will be void (*Hodson v. Observer Life Assurance Society*, 26 L. J. Q. B., p. 303). But the policy in the present case is not within sec. 46 of the statute; it is therefore not illegal under the statute. See *per* Wightman, J., in *The London and North Western Railway Company v. Glynn*, 28 L. J. Q. B., at p. 191. And the conditions of this policy do not require that the trusts of the property insured shall be declared. A person insuring a chattel, and having only a limited interest, must, if he insure to the full value, intend to insure the entire interest at the time he effects the insurance; otherwise he would recover more than an indemnity for his own loss, and he would not be liable to the other interested parties for the balance But if, even without instructions, or without its being known for whom he is a trustee, or where the interests of others are contingent only, a person who has a limited interest in the chattel insures it for the full value, intending to protect the vested or contingent interests of other interested parties, the contract will be valid, and if the chattel is wholly destroyed the value of the whole must be made good, and the insured will hold the surplus, after applying so much as will cover his own interest, as a trustee for those whose interests he intended to protect. See *Lucena v. Crawfurd*, 3 Bos. and Pul., p. 97, and *per* Campbell, C.J., in *Waters v. Monarch Insurance Company*, 5 Ell. and Bl., p. 870; 25 L. J. Q. B., p. 102. The intention of the person insuring is a question of fact proper to be submitted to the jury (*Irving v. Richardson*, 2 B. & A., p. 193). In the present case this question was put to the jury and they have answered it in favor of the plaintiff's claim for the full amount. The plaintiff is not entitled to hold the premium paid into court on the second count, and also to recover damages under the first count. The verdict must be reduced, although the rule does not ask for the reduction, by £4 11s., the amount paid into court and taken out by the plaintiff, and will be entered for £595 9s. The rule will be discharged.

Rule for a nonsuit or to reduce damages discharged.

RENNISON v. KEIGHRAN. Aug. 12.

Married Women's Property Act (No. 384), sec. 18. Bill of Exchange—Action by holder against acceptor, a married woman—Plea of Coverture—Meaning of sec. 18 of Act No. 384.

Rule *nisi* to enter a verdict for defendant. MR. HOOD and MR. KELLEHER moved the rule absolute; MR. HODGES showed cause.

The action was brought to recover £150, the amount of a bill of exchange accepted by the defendant. The defendant pleaded that she was a married woman, and the plaintiff replied that she had separate property to her own use, and could therefore be sued. A verdict was entered for the plaintiff, but leave was reserved to set it aside and enter a verdict for defendant.

MR. JUSTICE HOLROYD delivered the judgment of the Chief Justice and himself, Mr. Justice Higinbotham dissenting:—Verdict for the plaintiff, and rule *nisi* to enter verdict for the defendant. The action was brought for non-payment of a bill of exchange by the drawer and holder of the bill against the acceptor, a married woman, who pleaded her coverture at the time of acceptance, to which the plaintiff replied that then, and at the time of action brought, she had property for her separate use. A deed of settlement was put in evidence, and admissions made at the trial, from which it appeared that the defendant was married before the Married Women's Property Act (No. 384) came

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into operation, and that in consideration of the marriage, amongst other properties settled in various ways, a sum of £2200 had been vested in trustees upon trust to pay the income to the defendant for her life for her separate use without power of anticipation, and that she had ever since been receiving this income. The 18th section of the Married Women's Property Act enacts that "every married woman having property for her separate use shall be considered a *femme sole* for the purpose of contract and wrongs and injuries and suing and being sued in any civil proceeding;" and the sole question which we have to determine is whether the defendant in this case comes within the description of a married woman having property for her separate use as it is to be understood in that enactment. According to the ordinary canons of interpretation, she certainly does. Every married woman means literally every woman who may happen to be under coverture at the time to which the inquiry relates. That the literal meaning is the true meaning of those words in section 18 is confirmed by other parts of the statute. In several sections it is obvious that the words "a married woman," or "any married woman," are used of women who were married before as well as of those who were married after the act began to operate; and in the only sections (3 and 4) in which there is reason to suppose from the subject or context that the date of marriage, as precedent or subsequent to the commencement of the act, must necessarily be of importance, the language has been varied so as to express exactly what was intended. By parity of reasoning, the phrase, "having property for her separate use," must also be referred to the time of the inquiry—*i.e.*, in this case to the time of the contract—and the word "property" must include every kind of property which a woman can enjoy free from the obligations and control of her husband inasmuch as no particular kind has been specified. It will be observed that in one point our judgment overrules the decision in *Hutchins v. Cunningham* (2 V. R. L. 236). There the Court construed "having," not as "who may hereafter have," but "who may hereafter acquire." Possession and acquisition are distinct things. The leaning of the courts, as it is called, against retrospective legislation, which signifies merely that where the intention of an enactment is ambiguous it must be construed favorably to the maintenance of existing rights, cannot justify the transformation of one expression into another of which the sense is totally different. With regard to the extent of the term "property" in section 18, it has been contended that it should be limited to property made separate by the act itself. But, if that be so, why has not the same mode of expression been adopted in other sections? Why have the qualifying words, "by this act declared to be her separate property," which have been added in sections 12 and 15 been omitted in section 18? "A judge," says Serjeant Stephen, following the language of the judges in an old case (Edricle's 5 Rep. 118, b) "is not at liberty in favour of a supposed intention to disregard the express letter of a statute, where for anything that appears the wording may correspond with the actual design of the Legislature." May not, or we should rather say, must not, the letter of section 18 correspond with the design of the framers of this act, as it can be collected from internal evidence, or from the mischief to be remedied? The inability of a wife having separate estate to enter into contracts binding at law, or to sue or to be sued on contracts in her own name alone, was an anomaly awaiting redress. In equity the separate estate was liable not only for her bonds, bills, and notes, but for her general engagements, that is, engagements made "with reference to or upon the faith or credit of that estate" (*Johnson v. Gallagher*, 3 De G. F. & G. 513; *London Chartered Bank v. Lempriere*, 4 L. R. 4 P. C. 572.) Can any reason be assigned why the power of enforcing contracts, and the corresponding liability to actions, should have been conferred upon such married women only as were entitled to their property at law? Is a paltry estate created separate by the act to change the entire status of a married woman, and a handsome income independent of the act to leave her untouched? Can any tendency of the Legislature to draw this distinction be discovered? Its tendency is rather to abolish such distinctions. To obtain the benefit of a judgment, it may be needful on occasion to seek the assistance of a Court of Equity. But there are various means by which equitable interests can be rendered available for the satisfaction of creditors, even without such intervention; and, wherever the difficulty arises, the same thing might occur in the case of a man. The transformation of a *femme coverte* into a *femme sole* for certain purposes is equivalent to investing her to that extent with a man's rights and responsibilities. Section 18 affords a curious illustration of the maxim, "*a verbis legis non est recedendum*" and of the converse "*qui hæret in litirâ, hæret in cortice.*" We are to bend the liberal reading to the plain intendment of the Legislature, but to adhere to the letter against a merely conjectural intention. The phrase "separate use" has a distinctive meaning, and elsewhere in the act is used in the sense in which it is understood in courts of equity. If this restricted but yet ordinary meaning were given to it in section 18, the capacity of binding themselves by their contracts would be conceded to those wives alone whose rights of property were recognised only on the equity side of the Supreme Court. That would plainly be contrary to the spirit of the act. Is it less so to deny the right of free contract to a portion only of that particular class? It is said that married women having property to their separate

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use of a kind not created by the act are excluded from the operation of section 21, and it is assumed that section 21 must be co-extensive with section 18. Section 21 enacts that "all married women having real or personal property of any kind within the provisions of this act shall be liable to be made insolvent, or be capable of becoming insolvent, &c." To interpret one clause by another more difficult is never satisfactory; and we are not at all sure that the words "within the provisions of this act" have the limited meaning assigned to them. They may embrace all property with respect to which a legal power of disposition or other legal rights or liabilities have been substituted for equitable. But however narrow their signification, they qualify in some sort the word "property," which is unqualified in section 18, and only supply another instance that where qualifying words are wanted the Legislature has used qualifying words. If Parliament intended to confine the application of the insolvency laws to married women who might obtain benefits under the act in the shape of additional separate property, good reasons might be found for the restriction, and especially in the penal enactments which those laws contain. But, after all, the reasons of the Legislature, when undisclosed in any way of which the law allows judges to take cognisance, are too conjectural for judges to rely upon. The case of *Noyes v. Glassford* (3 V. L. R. (L.) 77), supported as it is by English precedent (see *Sanger v. Sanger*, 11 Eq. 470; *London and Provincial Bank v. Boyle*, L. R. 7 Ch. D. 773), is a clear authority for our present decision. There it was held that by the effect of section 11 of the Married Woman's Property Act, a woman who had married before the act, and who after the act had become entitled to personal property to her separate use, was released from a restraint on anticipation attached to such property by the instrument under which she took it. By the amendment act of 1882 (No. 736, Sec. 6), the efficacy of such restraints on alienation was for the future restored. But the foundation of the judgment has never been shaken, and that was, to put it shortly, that the Legislature meant exactly what it said, there being nothing to show the contrary. The rule must be discharged.

Rule to enter verdict for defendant discharged.

August 26.

(Before their Honors Mr. Justice Williams and Mr. Justice Holroyd.)

THE QUEEN v. CARR, *Exparte* SANDERSON.

Pounds Act 1874 (*No.* 478), *sec.* 15—*Land Act* 1869(*No.*360),*sec.* 60—*The managers of a common cannot sue for trespass rates under sec.* 15 *of Act No.* 478,*not being "occupiers" within the meaning of that section.*

Order *nisi* to quash an order made by justices at Dunolly, by which Mr. Sanderson was ordered to pay a sum for trespass fees in respect to a number of sheep trespassing on the Bealiba Common. The complaint against Mr. Sanderson was made by the managers of the common. On the 20th August last the agent of the managers seized 198 sheep belonging to Mr. Sanderson that were trespassing on the common and impounded them. On the 25th August he seized 124 other sheep, also for trespassing, and impounded them. The sheep were subsequently surrendered to their owner, but the managers sued in the police court for trespass fees. There were two summonses—one relating to each flock of sheep. It was contended for Sanderson that the managers of a common could not sue for trespass fees. By section 15 of the Pounds Statute it was provided that the "occupier" of any land upon which cattle trespassed might sue for trespass fees. By section 6 of the Land Act 1869 managers of commons were declared to be "owners" of the commons. It was therefore contended that the order made by the justices was bad, inasmuch as only occupiers could sue, and that the managers of the common were not occupiers. On behalf of the complainants it was urged that the term occupier did not exclude the managers of a common from their right to be complainants in a summons for trespass fees.

DR. MADDEN and MR. BARRETT moved absolute the order to quash the order of the justices; MR. HODGES showed cause.

MR. JUSTICE WILLIAMS, in delivering the judgment of the Court, said: The application in this case was made under sec. 4 of the Act, No. 571, to quash an order made by justices for payment of trespass rates under sec. 15 of the Pounds Act 1874 against the applicant on the grounds that the justices had no jurisdiction to make the order, and that the order was bad on its face and ought not in law to have been made. The complaint on which the order was founded was made against the applicant by certain persons, Mitten and others as managers duly appointed of the Bealiba Common, and the principal and main ground of objection to the order was that the complainants, as the managers of the, common could not sue for trespass rates under sec. 15 of the Pounds Statute 1874, not being "occupiers" within the meaning of that section. We think this objection must prevail. By section 60 of the Land Act 1869 certain powers are conferred upon the managers of commons for the government of the commons, and in the clause conferring those powers it is enacted that "such managers shall be taken to be the owners of the common within the meaning of any act now or hereafter in force relating to the impounding of cattle." That is as much as to say that, with respect to impounding, the managers of commons are to possess the same statutory powers and be subject to the same statutory restrictions as if they had been owners of the land trespassed upon they would have possessed or been subject to by virtue of their ownership, and no other statutory powers

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or restrictions. At the time when the Land Act 1869 came into force the Pounds Act 1874 was not in existence, but the Pounds Statute 1865 was, which is in some respects very different. The Legislature in framing the last-mentioned act has confined nearly all the provisions relating to or connected with the impounding of trespassing cattle to the occupier of the land trespassed upon, and has with the decision of this Court, in *Goldsbrough v. Fletcher* (6 W. W. & A'B. (L.) 213), to which we shall presently refer, before it, purposely omitted the word "owner" in sections 15 to 18 and other sections, though, perhaps, by virtue of the words "as any bailiff" inserted in section 60 of the Land Act 1869, the managers of a common, though the owners, might exercise the powers given by section 18 of the Pounds Act 1874, which without those words they could not. It appears to us, therefore that the complainants had no *locus standi* so as to entitle them to sue under the 15th section. The case of *Goldsbrough v. Fletcher*, already mentioned, is an authority in point, and the reasoning of the Court in the judgment supports the conclusion at which we have arrived. The Court in that case decided that the managers of a common were not "occupiers" within the first proviso of section 32 of the Pounds Statute 1865, and stated that under that act certain powers were conferred upon "owner" when that term was used, and upon "occupier" when that term was used. With that judicial interpretation of the previous statute standing unimpugned, the omission of the word "owner" from the later act becomes all the more significant; nor can section 3 of the existing act, in our opinion, affect our conclusion, because to constitute a person an occupier under that section he must still be a person "occupying." We therefore think the order to quash must be made absolute; but as the objection argued before us, and on which our decision is based, was not taken in the court below, we think it should be absolute without costs.

Order made absolute to quash the order made by justices directing payment of the trespass rates.

August 26

KING v. THE MAYOR OF KEW.

Local Government Act 1874 (*No.* 506), *sec.* 377—*If a municipal corporation elect to do an act which they are permitted to do, the performance of which is not imperative, it must do the act in such a way as will not interfere with or injure private rights.*

Demurrer to plea.

DR. MADDEN and MR. BOX for the plaintiff, in support of the demurrer; MR. WEBB, Q.C., and MR. HODGES for the defendant, in support of the plea.

The plaintiff, Annie King, sued the corporation of Kew to recover damages for losses she had sustained through the defendants having cut down Barker's road, and left her house several feet above the new level of the road. She also sued for damages she sustained in consequence of the defendants having erected some fences at the side of the road. As to the cutting down of the street, the defendants contended that they had a right to make any alteration in the street as the levels had not been fixed, and as to the fences, they were put up for the protection of persons passing along the footpath.

MR. JUSTICE WILLIAMS, in delivering the judgment of the Court, said: The declaration in this case contained two counts—(1) for cutting down and lowering a street to a depth and level greatly below its former and accustomed height and level, and also greatly below the level of the house and premises of the plaintiff adjacent to the said street, thereby obstructing the entrance to the house and preventing egress and regress to and from the street; (2) for unlawfully erecting certain fences in and upon the street with the same result. To the first count the defendants, for a second plea, pleaded virtually that the level of the street had never been fixed within the meaning of the Local Government Act 1874, and that they therefore had power under that act to do what the first count complained of. This plea was demurred to, on the ground that the defendants had no right to lower or cut down the street in the manner alleged before the level had been fixed in the manner required by the act. To the second count the defendants, for a third plea, justified the erection of the fence on the ground that the roadway was a great distance below the footpath, and so rendered the footpath dangerous to persons using it, and that they erected the fence to prevent such danger. To this plea plaintiff replied that no such danger existed before defendants cut down the roadway below its former level, thus leaving the footpath dangerous to persons using it by reason of its overhanging the roadway. Defendants rejoined that they had a right to do the act mentioned in the replication, because the level of the street had never been previously fixed. To this rejoinder plaintiff again demurred on substantially the same grounds as that raised by the demurrer to the second plea. The arguments pressed by counsel for the plaintiff were, as to both demurrers, that the defendants had no power to cut down or lower the street before they had fixed the level in the manner specified by sec. 405 of the Local Government Act 1874; and further, as to the second demurrer, that even if they had power to do so before the level was fixed they could not, by cutting the street down in such a way as to create a nuisance, erect a further nuisance to prevent danger arising from the first nuisance. Counsel for the defendants, on the other hand, contended that under the Local Government Act 1874 the defendants had by sec. 377 power to lower the road or any part of the road whenever and to any extent they liked until the level had been fixed in the mode specified by sec. 405, or, in other words, that

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compliance with sec. 405 was not a condition precedent to their rights under sec. 377; and further, as to the second demurrer, that if they had power under the act to cut down without fixing the level, they were bound, if in so doing they created a danger, to fence off that danger from the travelling public. These demurrers were very ably argued on both sides, but it appears to us that a broader point lies at the back of the point urged, which, without considering the main point relied upon in argument by counsel for the plaintiff, disposes of both demurrers in his favor. This point was not, however, adverted to in argument for the plaintiff. The act on the proper interpretation of which the decision of these demurrers depend is the Local Government Act 1874. Sec. 377 of that act empowers the council of every municipality, subject to the provisions of the act, to, amongst other things, raise or lower the ground or soil of any street or road. The section is an enabling section. The enabling word is "may," which is in this section clearly permissive. Therefore, whatever may be the construction of the words "subject to the provisions of this act," in section 377, liberty is merely given to the council to do those works if it likes. If this view be correct, as we are of opinion that it is, the recent cases of *Vernon v. The Vestry of St. James, Westminster*, 16 Ch. D., p. 449, and *Managers of the Metrop. Asylum District v. Hill and Others*, 6 App. Cases, p. 193, apply, which establish the principle that where an act of Parliament merely authorises, but does not order, a body to do a particular act, it does not authorise such body to do that act in such a way as to create a nuisance or to injure or interfere with private rights, unless such an intention clearly appears in the statute itself, either by express words or by necessary implication; and, further, that the onus is cast upon those who seek to interfere with those private rights of bringing themselves within the qualification of the general principle; or, as put by Lord Watson in the House of Lords, "Where the terms of a statute are not imperative but permissive, the fair inference is that the Legislature intended that the discretion as to the use of the general powers thereby conferred should be exercised in strict conformity with private rights." It appears to us that these principles are fairly applicable to the facts of the present case as disclosed on the pleadings involved in the demurrers. A road had existed at a certain uniform level to and from which the plaintiff, who was the owner of a house and premises adjoining the road, had ingress and egress. The defendants cut down this road in such a way as to leave a footpath and the plaintiff's house and premises at a considerable height above and overhanging the roadway, thus of course destroying all the plaintiff's right of ingress and egress. In plain words, they did that which was equivalent to a nuisance to the owners of the adjoining properties—they injured and interfered with individual rights. They obstructed the plaintiff's right of access to the public highway just as much as if they had blocked up his gateway (*Rose v. Groves*, 6 Scott N. R. 645-653); but the defendants claim to be entitled to do this under the act of Parliament. Now, the only authority in the act that can be pointed to as protecting the defendants from liability in respect of those acts is that contained in section 377; but as we have before pointed out, that section is permissive only, not imperative, and according to the decisions and principles to which we have referred, it merely authorises a council, if it elects to do the work, to do it in such a way as will not create a nuisance, and will not injure or interfere with private rights. We, therefore, think the defendants had no power, upon the facts stated in the pleadings, to cut down the street in the manner described, and if by so doing they did that which is equivalent to a nuisance to the individual, they clearly could have no right to erect another such nuisance in the shape of a fence to endeavour to counteract the danger arising from the original nuisance. Our decision upon this point renders it unnecessary for us at present to decide the main question argued, viz., whether or not a council has power to raise or lower the soil of a street before it has fixed the level in the way prescribed by section 405. Our judgment, therefore, on both demurrers is for the plaintiff.

Judgment for the plaintiff.

August 26.

CONNELL AND OTHERS v. CARROLL.

Insolvency Statute 1871 (*No.* 379), *secs.* 129, 131 and 151—*An acceptance of an offer of composition embracing all creditors by a three-fourths majority of the creditors will bind all other creditors even though dissenting.*

Demurrer to replication.

The plaintiff sued the defendant to recover a sum of £110 due on a promissory note, and for goods sold and delivered to a firm of which the defendant was a member, known as Grace and Carroll. The defendant pleaded that the firm had become insolvent; that its estate was sequestrated under the Insolvency Act of 1871, and that the debt sued for was contracted by the firm before the insolvency. The plaintiffs replied that after the insolvency three-fourths in number and value of the creditors of the insolvents had by writing under their hand agreed to accept a composition; that the judge of the Insolvency Court had sanctioned the acceptance of the composition, and that thereupon he had made an order releasing the estate of the insolvents from sequestration; that the plaintiffs had not agreed to the resolution to accept the composition, and had not accepted it, and had derived no benefit from it. The defendant demurred to this replication as being no answer to the plea.

MR. HOOD appeared for the defendant, in sup-

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port of the plea; MR. HODGES for the plaintiff, in support of the replication.

MR. JUSTICE HOLROYD delivered the judgment of the Court as follows: To a plea of sequestration of the estates of the defendant and his partner under the Insolvency Statute 1871, the plaintiffs replied nearly in the words of the 129th section, that before suit three-fourths in number and value of the creditors who had proved debts had agreed to accept an offer of composition, and that the estates had been released from sequestration, and then further averred that they (the plaintiffs) did not accept the offer, and that the terms of it had not, so far as they were concerned, been complied with, but did not aver that they had not proved a debt. The defendant demurred to the replication, his first point being that the replication was bad, because it alleged that the judge of the Court of Insolvency had made the order for the release, whereas the Court alone had power to make it. The objection may seem very trivial, but it is not so easy to get over, for it is certain that such orders can only be granted in open Court and after the fullest investigation. We think, however, we may dispose of this case upon other grounds. The really important objection to this replication is, not so much as Mr. Hood put it, that the defendant's liability was not revived by the order, but rather that the plaintiffs, though dissentient creditors, were bound by the agreement of the three-fourths majority. In support of the replication it was in the first place contended that sections 129 and 131 must be read together; that by virtue of section 131 his estate re-vested in the defendant in the same manner as if it had never been sequestrated, and subject therefore to all the liabilities to which it would have been subject if there had been no sequestration; and that, inasmuch as the debts of a dissentient minority are not barred by the statute, the dissentients are only concluded so far as concerns the release of the estate. The authority relied on was the case of *Crew v. Terry* (2 C. P. D. 403), which was decided upon the construction of the following words in section 81 of the Bankruptcy Act 1869:—"Whenever an adjudication of bankruptcy is annulled, the property of the debtor who was adjudged a bankrupt shall revert to the bankrupt for all his estate or interest therein." A composition had in that case been accepted under section 28 of the same act, upon the debts proved and admitted in the bankruptcy, the validity of which composition was not disputed; but execution creditors who had seized the bankrupt's goods before adjudication of bankruptcy were not parties to it, and had not proved their debt. The rights of the execution creditors over the goods were held to be reserved to them by the terms of the reverter, the bankrupt's interest having been subject to the rights of the execution creditors at the time of the adjudication. The *status quo ante* was restored. What the result would have been if the scheme of arrangement had not been confined to debts proved under the bankruptcy was not determined. The case cited, it is obvious, leaves the question untouched as to whom are bound by the acceptance of an offer of composition under sec. 129 of our act. It is not stated in so many words that the offer, when accepted, is to bind all the creditors, or all who have proved debts, but does it follow that it is to bind only those who may accept it? Consider what the offer is. It is an offer of composition, or security for composition, by the insolvent or any person on his behalf. Composition with whom, or to whom to be paid? When we speak of a man's compounding with his creditors and paying so much in the £, without more, we should be understood to speak of a composition with his creditors generally, that is, with all his creditors. The offer may be general. There is nothing in section 129 to prevent an offer being made by the insolvent or anyone for him to all his creditors. That is what is done in fact, and what the rules prescribe to be done (see Rule 105 and Form 60) whenever advantage is taken of this section, and the offer is naturally calculated upon an estimate of the value of the insolvent's assets as divisible amongst all. But if three-fourths accept and the rest are not bound, it is not the offer made which is accepted, but possibly something very different. The provisions for procuring fairness and compliance with the terms of the offer before the insolvent can procure the release of his estate lead to the same conclusion. The protection of the minority is remitted to the Court. The Court must be satisfied not only that the offer has been accepted, but that its terms have been complied with by the insolvent; that is to say, if it is payment that has been offered, that the money has been paid or tendered, or if it is security that has been accepted, that the security has been given. The Court must also be satisfied that acceptance of the offer has not been procured by the insolvent "or any one on his behalf, to his knowledge or belief, by any fraudulent or undue means or influence, or to the advantage of one creditor over another, unless with the knowledge and consent in writing of the rest of the creditors." The rest of what creditors? Not surely of the creditors only who have accepted the offer, but rather, as we think, of the whole body of creditors, as the expression is unqualified. It is possible that the creditors who have proved may have been intended, and that would be enough for our present purpose. The class to be bound must be co-extensive with the class whose consent is required. It must be remembered in construing this statute that although some preferences have been constantly allowed in the distribution of assets in bankruptcy or insolvency, and various ideas have prevailed as to what constitutes equality, nevertheless the principle of equal distribution amongst all the creditors is the key to its enactment. The 129th section of our present Insolvency Statute bears a much closer

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resemblance to section 86 of 5 Vict., No. 17, and to the corresponding portion of section 42 of the Insolvency Statute 1865 (No. 273), than to section 28 of the English Act 332 and 3 Vict., c. 71, or to any other English enactment. There are important differences between them. Under both those sections the offer had to be made either to a meeting of the creditors; and if three-fourths of those assembled agreed to accept it, the trustee had to call another meeting for the purpose of deciding upon it, and if at the second meeting three-fourths accepted either the original or any amended offer, the Supreme Court upon such acceptance being testified by them in writing, and upon oath of the insolvent that it had not been dishonestly procured, might release the estate from sequestration. The first acceptance was not binding upon anyone, even upon those who agreed; and it was not declared that the second should bind anyone but the acceptors. Yet it seems never to have been doubted that the proposal, to be entertained, must have been a general one, having for its object the satisfaction at least of all provable debts. In *Re Rowland*, (5 W. W. & A'B., (I. E. & M.) 2), in which it was decided that an offer of composition under section 86 of 5 Vict., No. 17, could be accepted only by creditors who had proved their debts, the judgment of our brother Molesworth was founded upon the assumption that dissentients were bound; and in *Motherwell's case* (8 V. L. R., (I. P. & M.) 6) he said, referring to the same section, "a majority in value accepted one shilling in the £. The minority would be bound by the majority." (See also *Re Schliess*, 3 V. L. R. (I.P & M.) 18); while *Re Scallan*, (2 V. L. R. (I. P. & M.) 8), speaking of section 42 of No. 273, he described its policy as "reinstating insolvents in their honest industries." The learned judge of the Insolvency Court evidently entertains the same opinion (*Re Marie*, 3 A.J.R. 630). We endorse these opinions, and we think they are confirmed by some recent decisions upon the construction of the 126th section of the English act, which corresponds with section 151 of our present act. That section, which deals with compositions where no proceedings have been taken in bankruptcy, contains a clause to this effect, that a composition accepted by an extraordinary resolution shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not effect or prejudice the rights of any other creditors. That is the only clause that defines the extent of the obligation which the resolution imposes. But it has been held that the clause is merely a limitation introduced for the benefit of creditors, and that any creditor not named in the statement may waive his right to pursue the debtor and claim the benefit of the composition. It is assumed that the composition to be proposed must be a general one, embracing all creditors; but the debtor can only be relieved against the will of dissentients to the extent to which he sets forth his obligations. Subject to this limitation, the minority of creditors is bound by the majority (*Breslauer v. Brown*, 3 App. Cas. 683, 686, 687, 702; see also *exparte Carew*, L. R. 10 Ch. 313, *per* Mellish, L.J.; *Melhado v. Watson*, 10 C. P. D. 291; *exparte Burrell*, *per* Bacon, C. J., 1 Ch. D. 547). It was further argued by Mr. Hodges, that if the plaintiffs were bound by an agreement of the majority of creditors, they were liberated by the non-fulfilment of the offer, and remitted to their original rights against the debtor. This argument, if a good one, would afford an answer to the plea entirely distinct from the one first propounded. There is much to be said in its favour. The Court may have satisfied itself of the facts of which it ought to be satisfied before granting an order for the release of the insolvent's estate. But the Court may have been deceived or mistaken. It may not be possible to impeach the release of the estate; but the efficacy of the agreement to deprive a non-assenting creditor (if not, indeed, any creditor) of his right of suit after the estate has reverted depends upon the fulfilment of the agreement as regards him (*Edwards v. Coombe*, L. R. 7 C. P. 519; *Goldney v. Lording*, L. R. 8 Q. B. 182; *Re Hatton*, L. R. 7 Ch. 723; see also *Slater v. Jones*, L. R. 8 Ex. 186). Unless the judgment of the Court in granting the order is conclusive upon all the creditors as to the fact of the fulfilment of the agreement, any dissentient creditor, at least (if not any creditor), must be permitted to prove the non-fulfilment, and upon his proving that, his right of action, temporarily suspended, must revive. We are of opinion, however, that the judgment of the Court on these matters was intended to be conclusive. Under our act the release from sequestration is the climax of the proceedings, and it must be preceded by a judicial inquiry, at which every creditor is entitled to be heard, and of which ample notice must be given under the rules (see r. 105). The matters to be inquired into embrace everything in which a non-assenting creditor might find reasonable ground for claiming exemption from the effect of the composition agreement. The burden of proof is on the insolvent, and he must show not merely that the agreement has been honestly procured, but that he has performed his part. All doubts and disputes are to be settled before the estate is released. Then, when the order has been obtained, the insolvent becomes a free man again, and starts clear, but until it is obtained, no dissentient is practically bound, for the estate remains in the hands of the assignee or trustee, and he must continue to administer it according to law. We think, therefore, that the replication is bad, and that the demurrer must be allowed.

Judgment for defendant.

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(Before their Honors, Mr. Justice Higinbotham, Mr. Justice Williams and Mr. Justice Holroyd.)

THE QUEEN V. JAMES. August 29.

A jury is entitled to put any question to a witness that counsel on either side could put, and to put such question at any stage of the case.

This was a special case stated by Judge Hickman Molesworth for the opinion of the Court. The defendant was charged with having stolen money from one Antonio Labrovitch, a sailor. The prosecutor stated that he had been paid a sum of £10, that £5 of this he had lodged in the savings bank, and the balance he retained; that the prisoner met him in Elizabeth-street, and stole his money from him. After the evidence had been given for the prosecution, and the counsel for the defence had addressed the jury, and the chairman of the sessions had summed up, the jury desired to ask Labrovitch if there was an entry in his bank pass-book of the payment of the money into the savings bank. The question was objected to, but was allowed, and Labrovitch stated that his pass-book was at South Melbourne, and that the payment had been entered in it. The points reserved for the Court were whether the question could be put by the jury to the witness in reference to the pass-book, and if it could be put at that stage of the trial.

THE COURT was of opinion that the jury were entitled to put the question. The counsel for the prisoner could have put the question. The prosecutor might have been asked by prisoner's counsel what he had done with the money, and at his own risk asked him to produce the pass-book; and a jury could put a question that counsel on either side could put. The jury was also entitled to ask the question at any stage of the case. The conviction was therefore affirmed.

Re CAULFIELD. August 30.

Insolvency Statute 1871 (*No.* 379), *secs.* 135, 138, (*sub-sec.* 12), 146—*Rules* 93,103—*Application by creditor under sec.* 146 *of Act No.* 379 *requiring insolvent to appear before the Court—Such application regulated by r.* 103—*What statement should be made on such proceedings—Rule* 93 *applicable to proceedings under sec.* 135.

This was an appeal against a decision of Mr. Quinlan, as judge of the Court of Insolvency, Melbourne, refusing a certificate of discharge to J. P. T. Caulfield, of Melbourne, broker, and also sentencing him to three months' imprisonment.

DR. MADDEN appeared for the appellant; MR. MACDERMOTT for the opposing creditor, Thos. Hayes.

Caulfield having become insolvent an application was made by Hayes, a creditor, to compel him, under section 146 of the Insolvency Statute to apply for a certificate. The insolvent did attend at the Court. The opposing creditor filed six notices of objection to the grant of the certificate under section 138. Among other objections was one that he had unlawfully expended money of which he had the charge or disposition as trustee, agent, factor, or broker only. Evidence was taken before the Court, and Judge Quinlan overruled all the objections, except the one stated, which he held to be proved, and on that ground not only refused the certificate but sentenced the insolvent to three months' imprisonment. Against this decision the insolvent appealed, alleging that on the evidence it was shown that he was not guilty of the offence charged. But it was also contended that the notice of objection was bad, that the objection should be stated with some reasonable certainty, as the insolvent was practically charged with a criminal offence, and the charge should be specifically stated. It was also submitted that the notice of objection should not have been given till after the evidence had been taken before the Court. This objection had been raised at the hearing in the Insolvent Court, but was overruled. It was contended that the objection was stated with sufficient distinctness, and that the proper practice had been followed in giving the notice of objection before the evidence.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said: The insolvent had not within six months after the sequestration applied for his certificate, and a creditor—Thomas Hayes—took proceedings under section 146 of the act to bring him before the Court. The creditor gave notice of objection to the grant of the certificate on six grounds, one of which was that he had unlawfully expended for his own benefit money he held as trustee, the objection being in the language of sub-section 12 of section 138. When the case came before the Court an objection was taken on behalf of the insolvent that the notice did not state the grounds of objection with reasonable certainty, in accordance with rule 93, and it was suggested that an amendment in it should be made. The suggestion was not acceded to, and the case proceeded. The evidence for the creditors was heard, then there was an adjournment, and afterwards the witnesses for the insolvent were examined. The learned judge held that the objection under section 138, sub-section 12, was proved, and refused the certificate, and sentenced the insolvent to imprisonment. The procedure under section 146 of the act was entirely distinct from that under section 135. Under section 135 an insolvent might apply for his certificate after three months from the date of the order of sequestration. But under section 146, as had been pointed out in *Re Frankel*, 4 A. J. R. 140, the proceedings were *in invitu* so far as the insolvent was concerned. The insolvent was brought before the Court against his will, and the Court might suspend his certificate, punish him, or otherwise deal with him as if the certificate had been applied for by him. The 93rd of the Insolvency rules was applicable to proceedings under sec. 135, where the insolvent himself applied for a certificate. That rule provided that any

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creditor or the trustee desiring to oppose the grant of a certificate of discharge, shall file with the chief clerk a notice of objection seven days at least before the day named in the notice of intention to apply for a certificate. The notice of objection shall shortly state with reasonable certainty the grounds of opposition intended to be relied upon. In a case under section 146 the procedure was different. Rule 103 provided that, "If the insolvent does not apply within six months after sequestration for his certificate a judge on the application of the trustee or a creditor may order him to attend on a day named in the order, and if he attend . . . the Court shall proceed to hear the witnesses, if any, produced by the trustee or opposing creditor; and the trustee or opposing creditor shall then, or at such subsequent time as the Court may order, give notice of objections to the insolvent, and the Court shall then hear the insolvent's witnesses, if any and argument, as on an ordinary application, and make such order as it may think fit." The applications under section 146 were, as was pointed out by Mr. Justice Molesworth, in *Re Goldsmith*, 5 V. L. R., regulated by rule 103. The insolvent was to receive notice to attend the Court, then the witnesses for the trustee or opposing creditor were to be heard, and not until then was the trustee or opposing creditor to give his notice of objection to the insolvent. After that the insolvent's witnesses were heard, and the Court was to deal with the insolvent as if he had voluntarily applied for a certificate. The proceedings under this section were necessarily of a hostile character against the insolvent, and it involved consequences possibly penal in their character. Whether the proceedings were under section 135 or under section 146 the insolvent should have distinct notice of the charge against him. A statement should be made with reasonable certainty as to what the charge is, and including more particulars than were stated in the section. There should be a statement of the nature of the property dealt with by the accused, the name of the person to whom the property belonged at the time when the act complained of was committed. This should be stated with sufficient distinctness to enable the person charged to know the offence with which he was charged, and to enable him to put forward his answer to it. In the present case the proceedings were altogether irregular; in the first place in supposing that the application was under section 135, and that notice of objection should be given before the insolvent was brought before the Court instead of when he was before the Court; and next, that the objection which merely set out the offence in the language of sub-section 12 of section 138 was not sufficiently stated. The judge should have stopped the proceedings when the creditor refused to amend his objection. The appeal would be allowed with costs. It was contended by Dr. Madden, for the insolvent, that the appeal being allowed, the insolvent should be granted his certificate. The Court did not agree with that view. If the proceedings had been taken in proper form, the judge of the Insolvency Court might have refused the certificate and awarded punishment. That was for him to determine, this Court could not go into that question. All that the Court saw was that the judge was wrong in his decision, and placed the parties where they were before the irregular notice was served on the insolvent, and before the insolvent was brought before the Court.

Appeal allowed with costs, order of the judge of the Insolvency Court refusing the certificate and sentencing the insolvent to imprisonment reversed.

Sept. 2.

HAWKES V. THE MAYOR, &c, OF SOUTH MELBOURNE.

Local Government Act 1874 (*No.* 506), *sec.* 18—*Second Schedule* 21—*Where a road is described as being the boundary of any municipal district the centre of such road is to be deemed the boundary.*

Appeal from County Court, Melbourne.

MR. HOOD for the appellant; MR. BOX and MR. M'ARTHUR for respondent.

The plaintiff, William Henry Hawkes, sued the defendants for damages for injuries done to himself and his horse by reason of a nuisance committed by the defendants in causing and permitting a projection and obstruction to the St. Kilda (or main Brighton) road, within their boundaries, and for the negligence of the defendants in the control and management of the St. Kilda road.

The evidence was to the effect that on the 6th April last the plaintiff was riding down the St. Kilda road toward St. Kilda; his horse struck against a stump, was thrown on to the metal, and was very much cut about; the plaintiff was also seriously injured. The stump was between the centre of the road and the western water channel. The jury gave a verdict for the plaintiff for £178. The defendants applied for a nonsuit, on the ground that the place where the accident occurred was not within their boundary, but within that of the city of Melbourne, and that the plaintiff should have sued the Corporation of Melbourne. In the second schedule to the Local Government Act describing the boundaries of the then borough of Emerald-hill, now the City of South Melbourne, the boundary was said to be "commencing on that point on the south bank of the Yarra River where it is intersected by the western side of Prince's-bridge, thence by the western side of the main Brighton road to a point due west from the northern side of the street known as High Holborn-street, in the parish of Prahran," &c. The accident took place east of the boundary so described, and the defendants therefore contended that it was not within their jurisdiction. The plaintiff, however, relied on sec. 18 of the Local

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Government Act, which provides that where any road, street, highway, stream, creek, or watercourse forms, is, or has been described as a boundary of any municipal district, or any sub-division thereof, a line along the centre of such road, street, highway, stream, creek, or watercourse, shall be deemed to constitute such boundary. This section shall apply to the city of Melbourne and town of Geelong. It was contended for plaintiff that according to this section the centre of the Brighton-road formed the eastern boundary of South Melbourne, and not the western side of the road. Judge Cope held that the western side of the road was the boundary, that the place where the accident occurred was not within the defendant's territory, and nonsuited the plaintiff. Against this decision plaintiff appealed.

MR. JUSTICE HIGINBOTHAM, after stating the facts of the case, said that the question to be decided turned upon the description of the boundaries of the city of South Melbourne contained in the schedule to the Local Government Act, and on the interpretation to be placed upon section 18 of the act. The schedule was in these words—"commencing at that point on the south bank of the Yarra River where it is intersected by the western side of Prince's-bridge, thence by the western side of the main Brighton-road to a point due west from the northern side of the street known as High Holborn-street, in the parish of Prahran," &c. These words in their ordinary and natural sense described a mathematical line, starting from a point and arriving at a point, the first point being on the west side of Prince's-bridge, and the ultimate point being on the northern side of High Holborn-street, the line between these two points being on the western side of the main Brighton-road; but section 18 of the act contained this provision—"Where any road, street, highway, stream, creek, or watercourse forms, is, or has been described as a boundary of any municipal district, or any sub-division thereof, a line along the centre of such road, street, highway, stream, creek, or watercourse shall be deemed to constitute such boundary." The section provided that where a road "forms or is" the boundary, the centre of that road shall be deemed to be the boundary. In this case the main Brighton-road according to the schedule formed the boundary, and he therefore thought the centre of that road should be deemed to constitute the boundary between the two municipalities. The section was inserted apparently to avoid difficulties which might arise from misdescriptions in the schedule to the act of boundaries of adjoining municipalities, to prevent litigation as to their liabilities for the maintenance of the road and otherwise. As this accident occurred on the western side of the centre of the Brighton-road the defendants were liable for it. The appeal would therefore be allowed with costs, and the nonsuit set aside, and a verdict entered for the plaintiff.

Appeal allowed with costs. Verdict to be entered for the plaintiff for £178.

Sept. 4.

IN THE ARBITRATION OF HUSBAND V. HUSBAND.

Award set aside where the arbitrator has not dealt with a question which was left to him—Judicature Act 1883 (*No.* 761), *sec.*13—*Terms abolished for the purpose of carrying on the business of the Court, but continued for the purpose of measuring time.*

This was a motion to set aside an award by the arbitrator in this case.

MR. HOOD appeared in support of the motion; DR. MADDEN showed cause.

The award was impeached on several grounds, the one on which the Court decided being that the award was bad on its face, inasmuch as the arbitrator had omitted to decide one of the points left to him—namely, as to a partnership between the parties. An objection was taken by Dr. Madden that the application to set aside the award was made too late; that the Court had no jurisdiction to entertain the application; the award was made on the 24th June, and the attempt to set it aside should have been made before the last day of the term next following, but by the Judicature Act terms had been abolished since the 1st July.

MR. JUSTICE HIGINBOTHAM said: This is an application to set aside an award upon an admission made by the arbitrator that he had not considered a matter that had been referred to him. An objection was taken, in the nature of a preliminary objection to the hearing of the application, that it was made too late. The objection was founded upon the provisions of the Act 9 and 10, William III., chapter 15, by which, in case of voluntary reference to arbitration by an agreement in writing the award may be made a rule of court, and the Court had power to set aside the award, provided the application was made before the last day of the term next following after the publication of the award. In this case the award was published on the 24th June, and Trinity term expired on the 5th July. The Court was of opinion that the objection was met by the terms of the Judicature Act, and the rules under it. Sec. 13 of the act provided that the division of the legal year into terms shall be abolished, so far as relates to the administration of justice. The meaning of the section was that for the purpose of carrying on the business of the Courts terms should be abolished. But they were continued for the purpose of measuring time. Terms continued to exist for the purpose of limiting the time within which certain applications were to be made to the court. They were of opinion that under the provisions of the act and the rules made in pursuance of it, the sittings of the Full Court under the act were intended to be substituted for the terms under the old system; that the last day of the sittings of the Full Court was substituted for the last day of the term under the previous act. That being so, this application was made in time, as the present sittings of the Full Court were the

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first which had been held since the 24th June, the date of the publication of the award. They were also of opinion that the application to set aside the award should be granted, as the award did not deal with the question of partnership that had been left to the arbitrator, but simply directed payment of a sum of money. The objection was not taken in the notice of motion to set aside the award, but was allowed by the Court on the ground that it appeared on the face of the award. That being so no costs would be allowed.

Motion granted to set aside the award without costs.

INSOLVENT COURT.

(Before His Honor Judge Noel.)

Re SNELL. Aug. 27.

Insolvency Statute 1871 (*No.* 379), *sec.* 53—*A creditor can raise an objection to the affidavit of another creditor at a meeting under sec.* 53 *of Act No.* 379, *at any time before the creditor signs the resolution.*

There was an appeal from the decision of the chief clerk at the general meeting *in re* R. A. Snell, jun. At that meeting the list of creditors had been read by the chief clerk, in order to ascertain what creditors were present, and how they were represented. The chief clerk had asked all those present at the meeting whether any objection was taken to proofs of debt. No objection was taken. A resolution was then proposed and seconded appointing two trustees. As it was being put to the meeting, Mr. Braham, solicitor for J. T. Downing, proxy for J. Burnett, one of the creditors, wished to object to the proof of Beecham, Clark and Co., on various grounds. The chief clerk held that if the objection to be taken were a technical one as to the informality of a proof, it had already been waived by Downing having made no objection when asked, and if there were an objection to the merits of the proof, such could only be taken by filing an affidavit.

MR. BRAHAM appeared for J. T. Downing, proxy for Burnett; and Mr. J. ANDERSON for Beecham, Clark and Co.

HIS HONOR said: The chief clerk has referred to me a question, which, for future guidance, I will decide. The question is, at what time a creditor can raise an objection to the affidavit of another creditor at a meeting under the 53rd section. The object of objecting to the proof of a creditor is to prevent his voting. Voting is the signing the resolution by the creditor. Therefore I think objections may be taken at any time before the creditor signs the resolution. The practice has been to read out a list of creditors who have sent affidavits to the assignee, and ask if there be any objection to them. If objections be made they are decided by the chief clerk. If none are made, the creditor is allowed to be present and to vote. However, I do not think the right to be present includes the right to vote. The practice of the chief clerk is not an inconvenient or improper one, but as there is a distinction between a creditor being allowed to be present and being entitled to vote, I think that any objections taken to proof at any time before the voting takes place (and the time of voting is when the creditor signs his name to the resolution) do not come too late, and must be received by the chief clerk.

Solicitors: *Braham* and *Pirani* for Downing; *R. S. Anderson* and *Son* for Beecham.

SUPREME COURT.

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham and Mr. Justice Williams.)

August 29.

Re T. JAQUES MARTIN *Exparte* THE EQUITABLE LIFE INSURANCE COMPANY OF THE UNITED STATES.

Copyright Act 1869 (*No.* 350), *secs.* 36, 50—*Who is an aggrieved person within sec.* 50—*Who is the author of an engraving—What is an original engraving.*

DR. MADDEN moved for a rule *nisi* to rescind an order made by Mr. Justice Holroyd in Chambers, directing that the registration by Mr. T. Jaques Martin, general manager of the Colonial Mutual Insurance Company, of a design should be taken off the registry. The registration had been made under the Victorian Copyright Act, which provided that new and original designs might be registered. Mr. Martin registered his design in 1877, and had allowed the Colonial Mutual Company to use it in their prospectuses, &c. The Equitable Company alleged that the design was not new or original, but was, as nearly as possible, a copy of one adopted by that company in 1869, and used since by it in America and Europe. Mr. Justice Holroyd agreed with the Equitable Company as to the law and the facts, and therefore directed that the registration by Mr. Martin should be removed; but, having some doubt, he suggested that the matter should be brought before the Full Court. After reading His Honor's judgment, as reported in 6 A. L. T. 31.

MR. JUSTICE WILLIAMS said that he confessed he did not see any room for doubt.

MR. JUSTICE HIGINBOTHAM said that there was a similarity between the two designs. Both companies were insurance companies, and the Equitable Company had, apparently, published its design all over the world for years before the registration was made here. Was it not possible that the New York design might have been seen here or elsewhere?

DR. MADDEN: As your Honors appear to be doubtful, I must confess I am not so clear on the matter to press the application.

Motion to rescind the order of Mr. Justice Holroyd refused.

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SITTINGS IN EQUITY.

(Before His Honor Mr. Justice Molesworth.)

KNIGHT V. KNIGHT. Aug. 28.

Will—Construction— "Child"—Trustees — Carrying on testator's business—Omitting to file accounts within 15 months—Costs—Mining shares—Calls and dividends.

This was a suit in the name of Wm. Charles Knight, an infant 12 months old, by his mother, as next friend, to have the estate of his grandfather, Wm. Knight, administered under the direction of the Court.

MR. WEBB, Q.C., and MR. A'BECKETT appeared for the plaintiff; MR. HIGGINS and DR. QUICK for the defendants.

HIS HONOR gave the following judgment:—Mr. Wm. Knight made a will November 11, 1881, by which, after particular legacies, he left his real and personal property to his wife Ellen and Messrs. Tolmie and Parkinson as executrix and executors upon trust, virtually either to allow them to remain as at his death or convert into money, and to invest the money at interest on real or Government security or bank deposit; and he directed them to divide the income equally between his wife and five children until the youngest child attain the age of 21 years, paying the share of income to adults, and upon the youngest attaining the age of 21, then dividing the corpus equally among the survivors. There was then a provision that if any child should die before becoming absolutely entitled, leaving lawful issue, then the child or children of such deceased should be entitled to the share to which such deceased should be entitled. There was then a provision for raising part of presumptive shares by way of advancement, and then a provision that the trustees should apply the whole or such part as they should for the time being think fit of the annual income of the share or fortune to which any child should, for the time being, be entitled in expectancy under the theretofore declared trusts for or towards the maintenance or education of such child, either directly or to his or her guardian, and should during such suspense of absolute vesting accumulate the residue thereof in or upon such securities or investments as were thereinbefore mentioned for the benefit of the person or persons who, under the trust therein contained, should become entitled to the same, with power to resort to the accumulation for subsequent years. the testator died November 29th, 1881, leaving his widow, his eldest son, William George, and four other children, some under age. This son married, made a will leaving all his property to his wife Elizabeth, and appointed her sole executrix, and he died April 8th, 1883, and after his death his child William Charles was born (August 21st, 1883), the plaintiff in this suit by his mother, Elizabeth, as next friend. As to the construction of the first will, I think that the present plaintiff became entitled to his father's rights, but am not sure how that may be in the event of his death under age before the youngest child of the first testator attained 21. At present I think that the maintenance clause applies to him. The word "child" includes grandchild, and that the trustees should apply so much of one-sixth of the income as they think fit for his maintenance and accumulate the rest. It has been insisted on behalf of his mother that she should share in the present benefit of this income, and I fancy that this suit is mainly attributable to an expectation of a decision to that effect, but I agree with the trustees as to their powers, and the propriety of the exercise of their discretion heretofore. The trustees have done many things wrong. They have carried on the testator's business instead of winding up as quickly as they could. They have allowed a specific devisee and legatee to hold possession without paying succession duty, also similarly paid pecuniary legacies to themselves and others. They purchased a small real estate with part of the assets, which they let to the eldest son. The state of the property caused a confusion, which their management has increased. They were bound by oath to file executors' accounts within 15 months, which they neglected, and I think thereby in some degree caused this suit. They have filed separate answers. I am doubtful about allowing them costs. There is a difficulty about the property as to mining shares, as to which I cannot blame them, under the words of the will. I do not think them chargeable for leaving property in that state, but it is very inconvenient from fluctuations in value and prolonged responsibility as to property limited like this, distinguishing corpus and income. A direct question raised before me is whether calls are properly payable out of corpus as a debt of testator. They are, but if so, I think dividends, at all events, from the same shares should be added to corpus. I shall direct that the trustees shall generally reduce all mining shares to money unless the chief clerk shall otherwise direct from some special difficulty in doing so. Declare that the trusts of the will of the testator Wm. Knight should be carried out by the trustee thereof under the direction of the Court as hereinafter provided, but otherwise at their discretion. Order that it be referred to the chief clerk to take an account of the real estate of the said testator, and of the rents and profits thereof which came to the hands of the defendants, Ellen Knight, Malcolm Tolmie, and Wm. Parkinson, and of the manner in which the same have been applied and disposed of. Also an account of his personal estate which came to their hands, and how the same has been applied and disposed of, and of his personal and outstanding expenses, and of his debts paid by the said defendants and outstanding, and to inquire and certify the amount of the said real and personal estates now in the hands of the said defendants respectively, and the amount for which they are respectively liable in regard to the

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parts thereof of which they have disposed. Declare that the said defendants are chargeable with the amount of succession duties payable upon portion of the said real and personal estates which they have given to devisees or legatees without deducting the same. Direct the said trustees under the direction of the said chief clerk at once to wind up the saddlery business of the said deceased which they have been carrying on, by selling the business premises and stock-in-trade and good will, together or separately. Declare that the said trustees were not warranted in investing a portion of the said estate in purchasing a freehold property, and direct them forthwith under the direction of the said chief clerk to sell the same, and bring the proceeds back into the general estate. As to the mining shares held by the said testator, direct that the said trustees proceed forthwith to reduce them to money, unless the said chief clerk, from some special difficulty, direct otherwise, and direct the said chief clerk to take a separate account of the said mining shares, and of the dividends received thereupon, and of the calls paid upon the same. Declare that according to the construction of the said will of the said testator, the infant plaintiff is entitled to one-sixth of the entire income of the said trust estate, and that the said trustees are entitled at their discretion to apply so much thereof as they think fit for his maintenance and education from time to time, and direct the said trustees to accumulate the residue of the said sixth by investments in Government or real securities, or temporarily upon bank deposit at compound interest, for such persons as ultimately may be held entitled thereto, all parties to have all just credits in taking the said accounts. Direct the said chief clerk to certify the rights of all the children of the said deceased according to the above directions, so far as they extend, and the results of the said accounts. Reserve all costs and further directions, liberty to apply.

HOLLEY v. HOLLEY. Sept. 1.

Will—Where the construction of a will is doubtful, the Court will construe it in such a way as to avoid an intestacy.

This suit came before the Court for its opinion as to the will of one Thomas Holley. The difficulty was caused by an ambiguity as to whether the testator intended to leave to his wife a policy of £200 on his life. In his will he left all goods, "furtune," and effects to his wife, and the question was whether "furtune," meant "furniture" only, or whether it was to be construed so as to include the policy.

MR. NEIGHBOUR for the plaintiff (the widow); MR. A'BECKETT for the defendants.

HIS HONOR said: This case was heard on bill and answer, but I have referred to the original will of Mr. Thomas Holley. Correcting misspellings and some palpable misplacing, it runs:—"The Last Will of Thomas Holley.—After payment of all my just debts, funeral, and testamentary expenses, I give, devise, and bequeath unto Matilda Holley, the wife of Thomas Holley, I leave all my property, house and land, and all the insurance money, £200, which she shall have all for her life, the house and ground, at her death house shall be sold for the benefit of (then a third page), Louisa Haddicott, Thomas Wm. Holley, and three other names; the house shall be clear of all debts, and is to be insured in case of fire. The said Matilda Holley let the house or she do wish she fit for her benefit. Matilda Holley shall have all money due to Thomas Holley, and all goods and furtune effects." Matilda was his wife. The doubt is as to a policy of insurance for £200, whether she took absolutely or for life only. The earlier part of the will would seem rather to give her a life interest only, yet it might be read "unto Matilda I leave all my property, house, and land, and all the insurance money which she shall have, all, house and money for her life, but at her death the house separated shall be sold for the benefit of Louisa Haddicott, &c." "Furtune," at the end, may mean "furniture," "fortune," "further," "future." Reading it "furniture," would tend to restrict the last words to specific chattels, but the other substitutes would make it a sweeping residuary clause, embracing an otherwise undisposed remainder of the insurance money. With considerable doubt, I am prepared so to declare, otherwise there would be an intestacy, as to that remainder which the Courts try to avoid (1 Jarman on Wills, 851). I shall declare that the insurance money belongs to Matilda Holley absolutely, that the trusts of the will should be carried out under the direction of the Court; refer it to the chief clerk to take the following accounts, as the parties may desire:—(1) An account of the personal estate of the testator; (2) An account of his debts; (3) an account of his funeral expenses; (4) an account of legacies given by his will; and (6) an inquiry what real estate he was seised of or entitled to at the time of his death; an inquiry what encumbrances, if any, affect his real estate. Order that further proceedings so far as relates to the form and manner of procedure be continued and concluded as if commenced after the commencement of the Judicature Act. It may save trouble to state that costs will probably fall upon the residue, this policy of insurance in particular. I regularly should take the words of the will rather than on pleadings, the cause being heard on bill and answer or on probate.

EQUITY JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

COHEN v. LINTZ. Sept. 18.

Motion by the defendant to be allowed her costs of suit and for an order calling upon the plaintiff, the trustee of George Lintz, the husband of the defendant, to hand over the balance of the

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estate, if any, after the insolvent's creditors had been paid in full.

The motion was made under liberty to apply reserved in the decree in the suit (see *ante* p. 18).

MR. FULLERTON in support of the motion.

MR. HIGGINS, to oppose, took the preliminary objections that the Court had no jurisdiction to make any order as to the application of an insolvent's estate, and that after the decree had been passed and entered there was no power to alter it by motion as was sought by inserting a provision for costs (Dan. Ch. Pr., 2nd Ed., 1011; *Coleman v. Syren*, 2 Cox Ch. Ca. 206).

HIS HONOR said: In *Porteous v. Oddie*, which I referred to in my judgment in *Wisbey v. Churchman**, you will find the same principle.

MR. FULLERTON contended that the defendant was entitled to have the balance of the property handed over to her, under liberty to apply reserved in a decree. The defendant is entitled to apply for her costs (*Fritz v. Hobson*, 14 Ch. D. 542).

HIS HONOR said: If the motion means anything at all it is to vary the decree, which might, perhaps, have been done originally, but it is too late now. The overplus might be got by an application to the Insolvent Court, and not to this Court, for I have no jurisdiction. I refuse the application without costs, as I think the case throughout has been very hard on the defendant.

Solicitors: For applicant, *R. B. Davies*; for the trustee, *A. M. Williams*.

*[The report of this case is unavoidably held over.—ED. *A. L. T.*]

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

IN THE WILL OF HAYES. Sept. 18.

Probate—The affidavit filed by an executor in support of an application for probate must be signed by such executor in full.

MR. WOOLF moved for probate to the executors George Christie and Dudley Mitchell Hayes, and submitted that the rules only required that the names should be set forth in the affidavit.

In the heading and in the body of the affidavit filed by the executors the names of the executors were given in full, but the affidavit was signed by one of them, Dudley Mitchell Hayes, as Dudley Hayes.

HIS HONOR refused the motion on the ground that there was no evidence that the Dudley Hayes who signed the affidavit was the applicant, Dudley Mitchell Hayes.

Proctors: *Briggs* and *Snowball*.

IN CHAMBERS.

(Before His Honor Mr. Justice Holroyd.)

VAIL v. GILMOUR. Sept. 17.

Rules of Supreme Court 1884, *Order XIX., rr.* 4, 11; *Order LXX., r.* 1—*Statement of claim—Dates and sums to be in figures, to be signed, and to state the particulars of damage.*

Summons on behalf of the defendant calling upon the plaintiff to show cause why the statement of claim should not be set aside as irregular and insufficient or be amended. The statement of claim was as follows:—

(1.) The plaintiff has suffered damage by breach of the defendant's contract and agreement with him made in the month of January, one thousand eight hundred and eighty one, by which the defendant for reward agreed to sell and dispose of the plaintiff's business as army and general tailor, carried on by him at ——, together with the stock-in-trade, fixtures, and goodwill therein, and also that the defendant should collect the debts due to the plaintiff, and out of the same and the proceeds of the sale of the plaintiff's property as aforesaid pay the plaintiff's creditors in connection with the said business, and after such payment of the creditors and reward to the defendant as aforesaid he should and would hand over to the plaintiff any sum or balance remaining in hand, and also that the plaintiff should until such sale and disposal of the property as aforesaid manage and conduct the said business at a weekly salary.

(2.) Some time after the making of the said contract and agreement, and whilst the defendant was proceeding in the execution of the same and prior to the plaintiff's being declared to be insolvent as hereinafter mentioned, the defendant informed the plaintiff that he had collected debts and received promises of payments from the debtors of the plaintiff amounting to about six hundred pounds, and suggested that the plaintiff should, the better to enable him to carry out the said contract and agreement and the preservation of the plaintiff's interest therein, make an assignment of the said debts and property and give him a letter to that effect, which the plaintiff accordingly did.

(3.) The defendant did not observe and carry out his said contract and agreement with the plaintiff, and did not pay his creditors pursuant to the terms of the same, whereby and by reason of which a judgment was obtained against him by Messieurs ——, unpaid creditors, and upon petition by them the plaintiff was duly declared to be insolvent, and all his property and estate of every nature and kind sequestrated, seized and sold.

(4.) The plaintiff's said weekly salary was not paid and now remains due.

(5.) The plaintiff incurred great expense in and about the matter and has otherwise suffered loss, and the plaintiff claims eight thousand pounds.

The summons was taken out on the grounds—1. That the dates and sums are not expressed in the said statement in figures but in words. 2. That the said statement is not signed either by counsel or by the plaintiff. 3. That the said statement contains no particulars or items of the alleged damages. 4. That no place of trial is named in

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the said statement. 5. That the said statement is not marked on the face with the date of the day on which it was delivered.

MR. HODGES, in support of the summons: Order XIX., rr. 4, 11, provide that dates, sums, and numbers shall be expressed in figures, that a signature either of the counsel or the solicitor is necessary, and that every pleading shall be marked on the face with the date of the day on which it was delivered. The statement of claim gives no particulars whatever; where special damage is claimed it must be stated. The defendants have to prove the breach of this contract.

MR. FULLERTON to oppose.

HIS HONOR said: Under the powers given to a judge in Order LXX., r. 1, I will allow the statement of claim to be amended. I order that the statement be amended at the cost of the plaintiff by inserting the dates and sums in figures, by adding the signature and the place of trial, and by stating the particulars as to the salary the plaintiff was to receive and the expenses he was put to.

Solicitors: For plaintiff, *Miles*; for defendant, *Farmer*, *Darvall*, and *Roberts*.

ROPER V. WILLIAMS. Sept. 18.

Interrogatory—When an objection is taken to answer an interrogatory on the ground that it may tend to criminate the person answering, the judge must decide whether, in his opinion, the question may have such a tendency—Rules of Supreme Court 1884, *Appendix K., No. 2—Form of order as to costs.*

This was an action for libel. There were three counts in the declaration. The first was for printing and publishing and causing to be printed and published a letter in the *Bendigo Independent* newspaper; the second count was for having the letter reprinted in the form of a sheet, and a third was for other publishing of the same letter. The pleas were, not guilty and justification.

The plaintiff now sought to administer certain interrogatories to the defendant. The defendant objected on affidavit to answer some of these interrogatories on the ground that by so doing he might render himself liable to a criminal prosecution.

MR. ISAACS in support of the interrogatories, submitted on the authority of (*Smith v. Powell*, 10 V. L. R. (L.) 79) that the objection as to criminality was not sufficient unless the judge were himself satisfied that the libel complained of would probably lead to a prosecution or conviction, and that in this case the libel was not of such a character as to satisfy the judge that a criminal prosecution would probably be undertaken.

DR. QUICK, in opposing, contended that before such interrogatories could be allowed special circumstances would have to be shown for allowing them (*Tupling v. Ward*, 30 L. J. Ex. 222).

HIS HONOR said: I am prepared to follow the case of *Lamb v. Munster* (10 Q. B. D. 110), which I have had occasion to consider sometime previously. Mr. Justice Stephen in that case says that in his opinion the judge must, when the objection is taken to answer an interrogatory on the ground that it may tend to criminate the person answering, decide whether in his opinion the question may have such a tendency. Having heard the alleged libel relating to this action, I must say that I think it is not one which would justify a criminal prosecution, or one about which it is likely to imagine any criminal prosecution would have been sustained.

On the order being presented to His Honor for signature, he said that part of the order which refers to costs is as follows: "The costs of and occasioned by this application," etc.. I will not sign an order in that form. Appendix K., No. 2, in which the form of order is given makes no mention of the costs "occasioned by an application." I will follow the form.

Solicitors: For plaintiff, *Cleverdon*, for *Brown* and *Ellison*; for defendant, *Hornby*, for *Crabbe*.

Sept. 18.

THE FREEHOLD INVESTMENT AND BANKING CO. OF AUSTRALIA LIMITED V. THOMPSON.

Rules of the Supreme Court 1884, *Order XIX., rr. 6 and 7—Statement of claim—Set-off and counter-claim — Particulars — A Judge in Chambers has no power to fix the amount of the costs of an application without the consent of both sides.*

Summons under Order XIX., rr. 6 and 7, on behalf of the plaintiff, calling upon the defendant to show cause why he should not deliver particulars of his claim of set-off under his defence, and also of his damages under his counter-claim.

The statement of claim was for arrears in rent due by the defendant to the plaintiff, for rates paid on the said property, and for damages for breach of contract, and covenants contained in a lease to keep the said property in repair.

The statement of defence alleged that the defendant is entitled to set-off part of the money claimed for work done by the defendant for the plaintiff company and for money paid by the defendant for the plaintiff company at their request. Also as to another parcel of the money claimed, that he is entitled to a set-off for money paid by the defendant for the use of the plaintiff company after the commencement of the action. And likewise that the defendant did keep the said property in good repair and condition (reasonable wear and tear excepted) according to the terms of the lease.

The defendant counter-claimed on the ground that he had suffered damage by the plaintiff company having on divers days and times broken and entered the said property, and broke down the fences thereof, and dug up the soil thereof and pulled down and burnt divers sheds thereon, and dug quarries thereon, and destroyed the grass and herbage thereof, and hindered and prevented the

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defendant from depasturing sheep and cattle on the same, and also killed and destroyed horses, cattle and pigs of the defendant, and otherwise injured and damaged him.

MR. ISAACS, in support of the summons, referred to *The Rory*, 7 P. D. 117; *Godden v. Corsten*, 5 C. P. D. 17; *Augustinus v. Nerinckx*, 16 Ch. D. 13.

MR. BOX, to oppose, submitted that the particulars required were given in the statement of claim.

HIS HONOR said: I think the defendant ought, with regard to the set-off, to give the particulars of the work done and money paid, and to whom it was paid; and as to the counter-claim, I think he should give the dates of the trespass and the items. The costs of the summons to be paid by the defendant. I certify for counsel.

MR. BOX then asked His Honor to fix the amount of the costs.

HIS HONOR said: I do not think I have power under the rules to tax the costs. I will consider the matter.

HIS HONOR subsequently said this was a summons for particulars of set-off and counter-claim. I directed the costs of the application to be paid by Thompson, but reserved the question whether I could fix the amount. By the Rules of the Supreme Court August 1884, certain of the rules of Order LXV. of the Rules of the Supreme Court 1884, and amongst them rule 23 of that order, are suspended as to all causes and matters commenced between the 30th June, 1884, and 1st January, 1886. No rule to the effect of that 23rd rule is to be found among the rules of last August. That rule authorised a judge upon interlocutory applications to direct payment of a sum in gross in lieu of taxed costs. Its omission from the August rules indicates an intention to deprive the judge of the power which it purported to confer. The Rules as to costs annexed to the Judicature Act, No. 761, which the August rules temporarily restored, contained no such provision, and it was for this reason that it was omitted from the August rules. It is a copy of an English rule introduced in 1883. Order LV. of the English Rules of 1875, which is the same as rule 3 of our August rules, states that subject to the provisions of the act the costs of and incident to all proceedings in the Court shall be in the discretion of the Court. (See also rule 47 of 1873, English). It was decided in England in 1881 that the discretion so bestowed was wide enough to permit the judge on the trial of an action to fix a definite sum for one party to pay as costs to the other, in order to avoid the expense of taxation (*Willmoth v. Barber*, 17 Ch. D. 772). I should have thought that the discretion was confined to directing by what party or parties, and in what proportions, the costs, or any part or parts of the costs, should be paid, and did not extend to fixing the amount arbitrarily. But, however that may be, the power there given is to the Court, and not to a judge in Chambers. A proceeding in Chambers is a proceeding in the Supreme Court, in one sense, but not before the Court; and a discretion of a judge in Chambers is not the discretion of the Court. Mr. Box suggested that what the taxing officer can do the judge may do, citing *Collins v. Aron*, 4 Bing. N. C. 235. But the taxing officer, unless otherwise specially empowered, can only tax; he cannot award a lump sum in lieu of taxing. Order LIV., rr. 6 and 7, and Order LXV., r. 27, clause 13, specify occasions on which a judge may order a lump sum to be paid by one party to another for costs. Seeing that these rules have been retained, while the operation of the more general rule has been suspended, I think that when the parties differ about the amount of costs, and will not waive taxation, I must either tax the costs myself, which in some petty cases need occasion no great difficulty, or I must leave the taxation to the proper officer. The parties, however, may always waive the taxation and agree upon the amount of costs; and if they both request the judge to fix the amount that is merely a mode of agreeing what the amount shall be.

Solicitors: For plaintiff, *M. H. Davies*; for defendant, *Sievwright*.

BAILEY v. BARCLAY. Sept. 19.

Common Law Procedure Statute 1865, *sec.* 211—*Foreign attachment—Where the writ is addressed to the garnishee under a wrong name a judge will not allow the writ to be amended; the application must be commenced* de novo.

The plaintiff sued the defendant for work and labor in building a house for the defendant. After the building was completed the defendant mortgaged it to "The Second Universal Terminating Building Society," and then left the colony. The society sold the property, and the plaintiff issued a writ of foreign attachment directed to the society under the name of "The Universal Building Society," to attach the balance in their hands after payment of their claims.

On the return of the writ MR. LEON raised the objection that the writ was served upon the garnishees under a wrong name, and that therefore the writ was bad.

It was submitted on behalf of the plaintiff that the writ might be amended by altering the name.

MR. LEON submitted that that could not be done, as it was directed to a society that had no existence.

HIS HONOR said: This writ of foreign attachment was addressed to a society named in the writ as "The Universal Building Society," and served on a clerk at the office. "The Second Universal Terminating Building Society" appeared by counsel to point out a defect in the writ in that the name was erroneously stated. Application was made to me to amend the writ by inserting the true name.

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The 211th section of the Common Law Procedure Statute, which deals with foreign attachment, provides that "an affidavit shall be filed on behalf of the plaintiff that the defendant is to the best of deponent's belief possessed of, or entitled to, or otherwise beneficially interested in property in the custody or under the control of any person or persons in the colony hereinafter called the garnishee or garnishees (to be named in such affidavit)." The garnishee, therefore, must be named in the affidavit. If the writ were amended as I have been requested to amend it, the name of the garnishee in the affidavit would vary from the name in the writ, and complications might arise from such a discrepancy. The 220th section says that the plaintiff shall enter into a bond; now, which name is the condition of the bond to follow? Is it to follow the name in the amended writ or the name in the affidavit? I think I have power under the rules, but I think I ought not to exercise that power. The application must be commenced *de novo*.

Solicitors: For plaintiff, *Kidston*; for garnishee, *Smith*.

TILLEY v. HOYT. Sept. 20.

County Court Statute 1869 (*No.* 345), *sec.* 43—*Application for remission of action to the County Court—Practice.*

Application under sec. 43 of the County Court Statute on behalf of the defendant that an action commenced in the Supreme Court for illegal arrest be remitted to the County Court unless the plaintiff show that he has a cause of action fit to be prosecuted in the Supreme Court or give security for the defendant's costs.

The defendant's affidavit stated, and it was admitted on behalf of the plaintiff, that the plaintiff in the action is an uncertificated insolvent, and that he had no means of paying the defendant's costs if unsuccessful.

MR. FINK, in support of the summons, submitted that under these circumstances the action should be remitted.

It was contended on behalf of the plaintiff that poverty was no ground for remitting an action to the County Court, and that the judge had no power to remit the action on the present application.

HIS HONOR said: I cannot go into the question now as to whether this action ought to be remitted or not. I will make an order in conformity with sec. 43 of the Act, and will give the plaintiff seven days within which to give full security for the plaintiff's costs to the satisfaction of the prothonotary, or to satisfy the judge that he has a cause of action fit to be prosecuted in the Supreme Court.

Solicitors: For plaintiff, *Kidston*; for defendant, *Smale, Hamilton* and *Wynne*.

WAINMAN v. HANSEN. Sept. 23.

Rules of Supreme Court 1884, *Order XXXI., r.* 11—*Interrogatories—An admitted item is not a matter in question in the cause—What discovery a party is entitled to on interrogatories—Discovery of documents not warranted by an order for interrogatories—Pleadings only ought to be used to ascertain whether interrogatories have been sufficiently answered.*

Summons under Order XXXI., r. 11, on behalf of the plaintiff for further and better answer to interrogatories delivered to defendant.

The plaintiff is the surviving partner of Blake and Wainman, and brought this action against the defendant to recover a balance which he alleges to be due from the defendant for work done and materials provided by the firm for the defendant according to contract. Blake died on the 20th of May, 1884, after the contract was completed, but before the action was commenced. The defendant insists that the firm were fully paid, and through mistake overpaid by him. In his defence he set forth a list of his payments with dates. The plaintiff in his reply admitted that the defendant had paid all the sums for which he claims credit, except one of £200 alleged to have been paid on the 30th of March, 1883. The writ was issued on the 7th of July, 1884.

The plaintiff delivered the following interrogatories to the defendant, all of which the defendant has objected to answer:—

(1.) State whether each of the payments claimed to be made by you in the first paragraph of your defence was made by cash, cheque, bill of exchange, or promissory note, or if by more than one of such means, then what proportion by each; and if wholly or partly by cheque, bill of exchange, or promissory note, then by whose cheque, bill of exchange, or promissory note.

(2.) Have you in your possession, or under your control, any book or books the entries in which will show what payments were made to you in your business of a chinaware merchant on and immediately preceding the 30th day of March, 1883, or distinguish whether such payments were made in cash, or by cheque, bill of exchange, promissory note, or other negotiable instrument, and any book or books the entries in which will show the disposal of such moneys or any parts thereof, if so, what books.

(3.) When, at what time of the day, and in the presence of what person or persons, did you make the alleged payment of the 30th day of March, 1883.

(4.) Did you not state to any person that such payment was made by your own cheque, or by your firm's cheque, and if so to whom.

(5.) How many banking accounts had you during the months of March and April, 1883, and at what bank or banks. Have you in your

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possession, or under your control, any book or books the entries in which will show what sums of money you paid into your banking account or accounts if you had more than one during the said months from the takings of your business of a chinaware merchant, and if so what books.

(6.) State as far as you are able what moneys you received in your business as a chinaware merchant, from the 25th to the 31st day of March, 1883, distinguishing the receipts for each day, and the method of payment, whether by cash or otherwise. Also the payments made into a banking account or otherwise out of such moneys.

(7.) Did you during the year 1883 carry on any other business than that of chinaware merchant, and if so, what business and where? Did you carry on the business of chinaware merchant at more than one establishment, and if so, at what establishment?

(8.) Did you in the year 1883 or 1884 have any transactions with James Richard Blake, in respect of any bills of exchange, promissory note or other negotiable instrument, except in respect of the promissory note alleged to have been given by you to the said James Richard Blake on the 1st June, 1883, and if so, what transactions?

(9.) Did you ever see or have in your possession the promissory note alleged to have been given by you to James Richard Blake on the 1st June, 1883, between that date and the 4th October, 1883, if so, when and where?

(10.) Did James Richard Blake at any time in the year 1884 demand, request or suggest any settlement of or investigation into the accounts in respect of the contract, the subject of this action, and that you either verbally or by letter communicated with him in respect of such contract. If so, what demand, request or suggestion was made and what communication took place and when?

(11.) Did you during the year 1884 have any business transactions with James Richard Blake, or was there any account outstanding between you, except in respect to the contract, the subject of this action.

(12.) Are you at present a member of any business firm; if so, what firm and when did you become such member?

Mr. Duffy in support of the interrogatories; Mr. Isaacs to oppose.

His Honor, after stating the facts as above, continued: The plaintiff gave notice that on the hearing of this summons he intended to use two affidavits filed on his application under Order XIV., r. 1, for leave to enter final judgment. I think these affidavits ought not to be used, but that I ought to look at the pleadings only to ascertain whether the interrogatories have been sufficiently answered. Care must be taken that the facilities which the Act intends to afford for expediting causes and saving expense are not perverted to the very opposite purpose. The summons refers to ten only of the interrogatories, omitting the 7th and 12th.

His Honor, after reading the 1st interrogatory, continued: In an action brought by executors against the makers of a promissory note given to the testator, the defendants as to part pleaded payment to the testator. They were permitted (under sec. 51 of the Common Law Procedure Act 1854) to interrogate the plaintiffs as to the time and place at which, and the circumstances under which the alleged payment took place, and why? Because owing to the testator's death the circumstances under which the payment was made, if it was made at all, were wholly without the knowledge of the plaintiffs and wholly within the knowledge of the defendants. The decision was founded on an earlier case of *Hawkins v. Carr* (L. R. 1. Q. B. 89), in which the judges state, as the result of their inquiries, that such an interrogatory had constantly been allowed in Equity in similar cases. In our Supreme Court it has been the common practice certainly for a plaintiff, where he is impeaching a deed as fraudulent, and wishes to show that no consideration passed, to allege in his bill that no consideration did pass, and to require the defendant, if he pretends the contrary, to state all the circumstances of the payment. The defendant does not say to whom he paid the £200, whether to the plaintiff or his partner. The plaintiff denies that this sum was paid to either of them. If it was paid I may fairly assume that the circumstances are not within the knowledge of the surviving partner, but wholly within the knowledge of the defendant. The defendant, therefore, must answer the 1st interrogatory so far as regards the disputed item; but I will not compel him to answer it with respect to the admitted items. As to these, it does not relate to any matter in question in the cause, and is therefore irrelevant (Order XXXI., r. 1, *ad fin.*). I have been urged to allow it as to the admitted items on the ground that the defendant's answer may render it improbable that the mode of payment which the plaintiff expects that the defendant will attempt to prove, or may be driven in cross-examination to assert, can have been the real mode. No doubt a plaintiff is entitled to discovery, not only of facts within the defendant's knowledge or means of knowledge which will support his own title or claim, but also of facts which will repel what he anticipates will be the case set up by the defendant. But his right does not extend to a discovery of the evidence upon which the anticipated case of the defendant is to be supported (*Attorney-General v. Corporation of London*, 2 Mac. and Gor. 247; see Wigram on Discovery, p. 285, pl. 372). Still less can he be allowed to extract evidence, on which an argument might perhaps be founded, tending not to rebut a case, but to impugn the defendant's veracity. The 2nd interrogatory is an interrogatory for the discovery of documents, which, according to

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Mathew, J., with whose reasons I entirely concur, is not warranted by an order for interrogatories; otherwise discovery of documents might always be obtained by means of interrogatories without paying the further deposit required by Order XXXI., r. 26, and a judge would be deprived of the discretion, which he possesses under r. 12, for refusing or adjourning the discovery if satisfied that it is not necessary, or not necessary at that particular stage (*Jacobs v. Great Western Railway Co.*, W. N. 1884, p. 33). When an order has been obtained under r. 12, an affidavit of the party from whom discovery is sought as to which, if any, of the documents in his possession or control relate to the matters in question in the cause is conclusive, unless from the affidavit itself, or any documents therein referred to, or from an admission in his pleadings, the contrary appears. It cannot be shown by a contentious affidavit that the affidavit of documents is insufficient (*Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556). That is a great protection to a person who is called upon to give discovery; but in the case last cited the three learned judges then sitting in the Court of Appeal seemed to intimate an opinion that the opposite party might evade the protection by administering properly framed interrogatories. The point was not argued, and the opinion, which was not necessary for the decision, will not justify me in permitting an evasion of the rules. The 3rd interrogatory must be answered as to the place and time of payment of the £200 for reasons already given. The rest is inadmissible (*Eade v. Jacobs*, 3 Ex. D. 337), and was abandoned. The 4th interrogatory is mere cross-examination to impeach credit, and is not allowable (*Allhusen v. Labouchere*, 3 Q. B. D. 654). The 5th interrogatory seeks discovery as to documents, and is irrelevant. The 6th interrogatory is an attempt to get material for cross-examination to credit on an expected answer to another interrogatory. The 8th interrogatory appears to me too general. If there were any transactions between the deceased James Richard Blake and the defendant concerning bills or notes having reference to the payment of the £200, to that extent I think this interrogatory should be answered, but no further.

The 9th interrogatory I disallow as irrelevant.

The 10th interrogatory is altogether too general, and I cannot distinguish any part of it which I could allow.

The 11th interrogatory I disallow as irrelevant.

Order that defendant do within three days deliver a further answer to the 1st, 3rd and 8th of the plaintiff's interrogatories to the extent which I have indicated.

I desire to state my opinion, having regard to r. 3 of Order XXXI., that all the interrogatories except the three last mentioned have been exhibited unreasonably and vexatiously. The costs of this application to be costs in the cause. I certify for counsel.

Solicitors: For plaintiff, *O'Halloran*; for defendant, *Braham* and *Pirani*.

MEUDELL v. M'LAY. Sept. 24.

Order XXXI., r. 1 — Interrogatories. — On an application for leave to deliver interrogatories the judge will not allow the party sought to be interrogated to take any objection as to the nature of the interrogatories.

Application on behalf of the defendant under Order XXXI., r. 1., for leave to deliver interrogatories to the plaintiff The action was for ejectment and for mesne profits and was set down for trial.

Mr. TOPP in support of the application.

An objection was sought to be taken on behalf of the plaintiff to the nature of some of the interrogatories.

HIS HONOR said: On the present application I cannot go into the question as to the form of the interrogatories. The party interrogated has a time given him within which to answer the interrogatories, or to object to answer them. This is not the proper time to take any objection. An affidavit has been filed in support of this application, setting forth that the applicant has a good defence on the merits, and that the application is not made for the purpose of delay, &c. I do not think an affidavit is required in an application of this nature. The pleadings themselves should show that the applicant has a right to deliver interrogatories. The costs to be costs in the cause, but the applicant is to pay the costs of the affidavit. As an objection was taken to the interrogatories, which the applicant may have thought it necessary to meet, and as the matter is a new one, I will certify for counsel.

Solicitors: For plaintiff, *Moule* and *Seddon*; for defendant, *Hurry* and *Major*.

Sept. 24, 25.

SOLOMONS v. MACKENZIE.

Rules of Supreme Court 1884, *Order LVII., rr.* 13, 15—*Interpleader—Sheriff's costs—A judge has power to award the sheriff his fees, &c., on an interpleader order—Form of interpleader order.*

Interpleader order. The forms of order given in Appendix K do not provide for the payment to the sheriff of his fees, &c., and His Honor reserved the question as to whether, under those circumstances, he could award the sheriff his fees.

HIS HONOR said: This was an interpleader order, and I reserved the question for consideration as to whether I could depart from the form of order given in Appendix K. so far as to direct that the sheriff's fees and costs should be paid. I find that Order LVII., r. 13, provides that a judge who tries an interpleader issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for; and by

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r. 15 a judge may in and for the purposes of any interpleaded proceeding, make all such orders as to costs and all other matters as may be just and reasonable. I think I have power under these rules to provide for these fees and costs, and will make the order as follows: — Upon hearing, &c., and upon reading the several affidavits, &c., it is ordered that upon payment of the sum of —— in Court by the said claimant within seven days from this date (or upon his giving within the same time security to the satisfaction of the Prothonotary of the Supreme Court for the payment of the same amount by the said claimant according to the directions of any order to be made herein), and upon payment to the abovenamed sheriff of his fees, possession-money, poundage, if any, and costs of this order, which, by consent of all parties, I fix at £——, the said sheriff do withdraw from the possession of the goods seized by him under the writ of *fieri facias* herein. And it is further ordered that unless such payment be made or security given within the time aforesaid, the said sheriff proceed to sell the said goods and pay the proceeds of the sale, after deducting the expenses thereof and the said fees, possession-money, poundage, if any, and costs, into Court in the cause to abide further order herein. And it is further ordered that the parties proceed to the trial of an issue in the Supreme Court, in which the claimant shall be plaintiff and the execution creditors shall be defendants, and that the question to be tried shall be whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the execution creditors. And it is further ordered that this issue be prepared and delivered by the plaintiff therein within fourteen days from this date, and be returned by the defendants therein within three days, and be tried at Melbourne with a jury of six. And it is further ordered that the question of the repayment of the said fees, possession-money, poundage, if any, and costs above mentioned and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods.

Solicitors for Sheriff, *Klingender*, *Charsley*, and *Dickson*.

PRALLE v. SLATER. Sept. 29.

Rules of Supreme Court 1884, *Order XXXVI.*, *r.* 6—*On an application to have an action tried with a jury the judge will look at the pleadings to ascertain whether the action is a fit one to be so tried—Affidavit as to the nature of the action unnecessary—Application to be made* exparte.

Application under Order XXXVI., r. 6, to have the action tried with a jury.

The action was for negligence and issue was joined. A consent of the opposite side was given to the application. The pleadings were not before the Court.

MR. BRADLEY, in support of the application, submitted that as a consent to the application was given an affidavit showing the nature of the action would not be necessary.

HIS HONOR said: I will not grant this application without an affidavit or without seeing the pleadings. Applications of this sort ought, in my opinion, to be *exparte*, and the consent of the other side is unnecessary. I think an affidavit as to the nature of the action is unnecessary. The judges should look at the pleadings to discover whether the action is one which ought to be tried by a jury.

On the pleadings being produced His Honor granted the application.

Solicitor, *Bradley*.

[See *Simmons v. Hall*, ante p. 45.—ED. *A. L. T.*]

DAVIES v. HERBERT. Oct. 2.

Rules of Supreme Court 1884, *Order III.*, *r.* 6—*Order XIV.*, *r.* 1—*Writ specially indorsed—Signing final judgment—Order III.*, *r.* 6 (*F*), *only applies to cases in which the relation of landlord and tenant exists between the parties.*

Application under Order XIV., r. 1, on behalf of the plaintiff for leave to file final judgment. The following affidavit was filed by the plaintiff's solicitor in support of the application :—

1. That on the 26th August, 1884, I caused the writ of summons with particulars specially indorsed thereon to be issued herein at the suit of the abovenamed plaintiff against the above named defendant, and a true copy of the said writ and particulars was, as I verily believe, duly served upon the above named defendant on the 13th September instant.

2. That on the 17th September instant the defendant caused an appearance to be entered for him and on his behalf in this honourable court.

3. That notice of the said appearance was delivered to him on the said 17th September, and also a demand for the delivery of a statement of claim.

4. That although a full statement of plaintiff's claim appeared on the said writ and copy served upon the defendant as aforesaid, I delivered a further statement of claim upon the agent of the defendant solicitor in the words following :— "The plaintiff's claim is to obtain possession of all the piece of land (describing the land), and to which land the plaintiff is entitled as owner thereof in fee simple, and the plan of which land appears on the copy of the writ of summons as served on the defendant herein."

5. That I verily believe the defendant has no defence whatever at law or in Equity to this action, and appearance has been entered for the purpose of delay only, as I believe.

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MR. ISAACS, for the defendant, raised two objections to the application—First, that the affidavit did not verify the cause of action. Second, that the writ was not one which could be specially indorsed, as it was not shown that the relation of landlord and tenant existed between the parties in accordance with Order III., r. 6.

It was admitted on behalf of the plaintiff that the plaintiff never had been the landlord of the defendant.

HIS HONOR said: Under these circumstances I must dismiss the summons. Order III., r. 6 (F), only applies to cases in which the relation of landlord and tenant exists between the parties, and does not apply to a case in which the owner of land seeks to recover the possession of it from a trespasser. Summons dismissed with costs.

Solicitors: For plaintiff, *R. Davies*; for defendant, *Eggleston*.

SOUTH AUSTRALIA.

SUPREME COURT.

(Before Way, C.J.)

Sept. 19.

ADELAIDE MARINE AND FIRE INSURANCE COMPANY v. THE COLONIAL INSURANCE COMPANY OF NEW ZEALAND AND REYNELL AND REINECKE.

Marine insurance—Usage—At and from—Full and complete cargo—Insurable interest—The plaintiffs having accepted an application for insurance from M. and Co. on a cargo of wheat which was to be loaded for them on the Duke of Sutherland, *at the port of Timaru, proceeded to insure the whole of their risk, except* £1000, *amongst other insurance companies. In March,* 1882, *the plaintiffs addressed the following application for cover to the defendants:—"Please hold us covered for not exceeding* £2000, *being two-fourteenths interest in a cargo of wheat per* Duke of Sutherland, at and from *Timaru, N.Z., to United Kingdom or Continent, warranted f.p.a. Declaration to be made upon completion of shipment, and rate to be as charged in New Zealand for similar risks." On the same day R., the defendant's manager, issued the following printed cover note:—"In accordance with your written request of even date you are held provisionally insured in the sum of (not exceeding)* £2000, *being two-fourteenths interest on wheat cargo now on board or to be shipped in the* Duke of Sutherland, *bound "from" Timaru, New Zealand, to United Kingdom or Continent, warranted f.p.a. Declarations to be made on completion of shipment and rate to be as charged in New Zealand for similar risks." Whilst loading the* Duke of Sutherland *foundered, taking four-fifths of the cargo on board, and the plaintiffs paid their amount of liability to M. and Co. in full. On action to recover amount of cover given by the defendants, the defendants pleaded* (1.) *That R. had not acted within the scope of their authority.* (2.) *That there was no contract to insure, inasmuch as the risk was "from" Timaru to United Kingdom, and not "at and from" Timaru to United Kingdom.* (3) *That the adventure insured against had not begun, because what was insured was a cargo—that is a full and complete cargo.* (4.) *That the plaintiffs had no insurable interest.* Held (1.) *That the defendant having allowed R. to hold themselves out as their agents, and having proved no limit to their agent's authority, or that it was notorious that there were such limits, the agents must be presumed to have acted within the scope of their authority.* (2.) *That according to usage in reference to cover notes "from" and "at and from" are convertible terms; that evidence of such usage is admissible where nothing repugnant or inconsistent with the written instrument is introduced.* (3.) *That although cargo means a full and complete cargo, the risk may begin before the loading is complete, because according to marine insurance usage a special warranty, excluding the loading risk, is given when such risk is not insured against.* (4.) *That M. and Co. having purchased the wheat f.o.b. such wheat was at their risk immediately it was put on board, and that they therefore had an insurable interest* (Anderson v. Morice, 1 *App. Cas.* 713, *distinguished*).

The facts and arguments will be found set out in the judgment.

SYMON, Q.C., for plaintiffs; J. W. DOWNER, Q.C., and H. F. DOWNER, for the defendant company; MANN, Q.C., for Reinecke and Reynell.

WAY, C.J. delivered judgment as follows: This is an action to enforce an executory contract for reinsurance. The plaintiffs having accepted an application from Messrs. Morgan, Connor, and Glyde for insurance of a cargo of wheat which was to be loaded for them on board the *Duke of Sutherland*, at Timaru, in New Zealand, proceeded to reinsure the whole of their risk except £1000 amongst other marine insurance offices carrying on business in Adelaide. On the 30th of March, 1882, they addressed what is called a "request" or "application for cover" to the defendant company (whom I shall hereafter call "The defendants") simply as follows: "Please hold us covered for not exceeding £2,000, being two-fourteenths interest in cargo of wheat per *Duke of Sutherland*, at and from Timaru, New Zealand, to United Kingdom or Continent, f.p.a., rate charged to be that ruling in New Zealand for similar risks." On the same day the defendants' local managers, Messrs. Reynell and Reinecke, sent to the plaintiffs on behalf of the defendants the following "cover-note" in the printed form used by them in their Adelaide business:—"In accordance with your written request of even date you are hereby held provisionally insured in the sum of (not exceeding) £2000 (being two-

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fourteenths interest) on wheat cargo now on board, or to be shipped in the *Duke of Sutherland*, bound from Timaru, New Zealand, to United Kingdom or Continent, warranted f.p.a., declarations to be made upon completion of shipment and rate to be as charged in New Zealand for similar risks." At the beginning of May the *Duke of Sutherland* (with her cargo) was wrecked and wholly lost. At the time of her loss she had on board a little more than four fifths of a full cargo of wheat, amounting in value to £11,500 19s. 5d. The plaintiffs paid their liability to Messrs. Morgan, Connor and Glyde, and have in turn been settled with by the reinsuring companies, except the defendants, who dispute any liability to the plaintiffs on the following grounds: (1) That their agents, Messrs. Reynell and Reinecke, had no authority to bind them by the cover note above set out; (2.) that there was no contract to insure, as the parties were never *ad idem*. (3.) That the adventure insured against had not begun; and (4.) That the plaintiffs had no insurable interest. I. Messrs. Reynell and Reinecke were joined as defendants after the original defence was filed, in order to make them directly liable to the plaintiffs in the event of it being held that they acted beyond their powers in giving the cover note to the plaintiffs. The power of attorney under which Messrs. Reynell and Reinecke acted was not produced. In order to prove the alleged agency, it was shown that in March, 1882, when the defendants established a branch business in Adelaide, Messrs. Reynell and Reinecke were appointed local managers and agents for the defendants and from that time were held out to the public and acted in that capacity. At the trial, on the authority of *Smith v. M'Guire* (3 H. & N. 554), I held that these facts proved a general agency sufficient to authorize the alleged contract. It was argued for the defendants that as insurance agents for foreign companies invariably act under powers of attorney, presumably limited by separate instructions, the power of attorney and instructions ought both to be produced, in order to show what was really the extent of the agent's authority. *Linford v. Provincial Horse and Cattle Insurance Company* (10 Jur. N. S. 1067) and *Baines v. Ewing* (L R. 1 Ex. 320) were relied upon for this proposition, but it is supported by neither. In the first of these two cases the agent was merely one for receiving and submitting proposals, and had no power to grant policies. In the second it was shown that in Liverpool it is notorious that an insurance broker's authority to underwrite policies is nearly always limited to some amount, and that the subscribing broker exceeded his limit. To make *Baines v. Ewing* applicable the defendants ought to have proved (and they did not attempt to prove) what were the limits of their agent's authority, that it was notorious that there were such limits, and that such limits had been exceeded. II. In order to show that the parties were not *ad idem*, two differences between the request for cover and the cover-note were relied on. In the cover-note, the words "declarations to be made on completion of shipment," which do not occur in the request for cover, are inserted. The risk is described in the request as "at and from Timaru;" in the cover-note it is "from Timaru" only. The request for cover was a letter wholly written. The cover-note being in the printed form ordinarily used in the defendant's Adelaide business, the occurrence in it of the words "declarations to be made on completion of shipment" is an indication that they decribe a usual term of acceptance of marine risks. Messrs. Reynell and Reinecke's insurance clerk tells us "the declarations are always supposed to be made at the completion of shipment, or the ascertaining of values, that is, so soon as the interests are known and defined." This variance, therefore, between the request for cover and the cover-note appears to be merely the omission from one and the insertion in the other of a term always implied in contracts of this kind. And according to a nnmber of leading insurance agents in this city, who were called for the plaintiffs, in the transaction of marine insurances the words "from" and "at and from" in the request for cover in the cover-note, and in fact in all the executory documents down to the "insurance slip," from which the policy is prepared, are convertible terms. "From" is said to be an abbreviation for "at and from." In the words of one of the witnesses (Mr. Phillipps), "we regard 'at and from' as usual words in the policy understood, and which, like other stipulations, cannot all be put in the cover-slip." A list was also put in showing that in about forty reinsurances accepted by the defendants from the plaintiffs "from" was used in the preliminary documents, and "at and from" in the final insurance slip. It was, however, objected that evidence of this usage was inadmissible, first, as contradicting the writing, and, secondly, because the words "at and from" have a well-understood meaning in insurance law. With respect to the first objection I adopt the language of Lord Campbell in *Humfrey v. Dale* (7 El. & Bl. 266, p. 274)—"Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view it will be admissible unless it labors under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument. And upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract without, you write the same contract with the added incident,

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the two would seem to import different obligations, and be different contracts." The second objection is, I think, well answered in the following observations of Mr. Justice Hill:—"I take the rule of law to be this—That words in a contract relating to common transactions of life are to be construed according to their plain, ordinary, and popular meaning; but if, in reference to the subject-matter of the contract, particular words or expressions have by usage acquired a peculiar meaning, different from their plain, ordinary, and popular meaning, parties using these words in such a contract must be taken to have used them in their peculiar sense, and evidence of usage fixing that sense is admissible to prove the meaning. That I take to be the rule of law; and it does not depend upon the point whether the expression is in itself ambiguous or unambiguous; it depends upon the fact whether, in reference to the subject-matter of the contract, the word or expression has acquired a peculiar meaning" (*Myers v. Sarl*, 30 L. J. Q. B., at p. 14). III. It is argued that the risk insured against had not commenced, because although the loss happened at Timaru, what was covered was a "cargo of wheat," and what was lost was only part of a cargo. The plaintiffs contend that "cargo" means that what is insured is something earning freight—"wheat," which is "cargo." Mr. Ashwin, the plaintiffs' secretary, says "a cargo of wheat means a cargo comprising wheat. If it were a mixed cargo of wheat and timber, and the wheat only insured with me, I should define it cargo of wheat." Would he do so if the ship were filled up with guncotton instead of timber? I cannot accept the plaintiff's definition. What they covered for the assured was "cargo of wheat per *Duke of Sutherland*." What they offered to the defendants in the request for cover was two-fourteenths interest in cargo of wheat per *Duke of Sutherland*," and that is how "wheat cargo" must be interpreted in the cover-note, if the cover-note is to be held to be part of a contract. "What, then," says Cleasby, B., in *Kreuger v. Blanck* (L. R. 5 Eq., at pp. 183-4), "does the word 'cargo' mean? It means the cargo of the ship, that is, what is put on board the ship, or what the ship carries. I think it means the whole cargo." And Mellish, L.J. (delivering the judgment of the Court of Appeal in *Borrowman v. Drayton*, 2 Ex. Div., at page 19), says:—"We are of opinion that an agreement to sell a cargo is, according to the plain and natural meaning of the words, an agreement to sell the entire quantity of goods loaded on board a vessel as freight for a particular voyage. Generally speaking, the term cargo, unless there is something in the context to give it a different signification, means the entire load of the ship which carries it." Possibly, as it would be to the advantage of the insurers if less than a whole shipload were at their risk, the assured might have an option under such an insurance as this if shipping less than a full cargo. But I agree with the defendant's counsel, Mr. Downer, that *prima facie* "cargo of wheat" in this contract of insurance means a full, and certainly not a mixed cargo. It does not follow that the risk does not begin until the loading of the cargo is complete. The experts in insurance business who were called, were uncontradicted, although the defendant's general manager was in court during the trial, and they all agree that an executory contract of the kind under discussion includes the "loading risk" which in practice is very rarely excluded. Several of the witnesses, speaking from 15 or 20 years' experience, say they have only known the loading risk excluded once or twice. When the risk during loading is to be excluded a warranty to that effect is inserted in the contract. Therefore, although the subject matter of the insurance is a "cargo of wheat," the indemnity contracted for covers a loss occurring during the loading. But it is said that as the plaintiffs were in the habit of reinsuring with the defendants, it must be taken as an implied term of the contract that the policy should be in the form commonly used by the defendants, which it is also said excludes the loading risk. There is no substantial difference in this respect between the form of policy used by the defendants and an ordinary Lloyd's policy, except that in the defendants' policy after the words, "loaden or to be loaden," the parenthesis commonin modern policies ("including risk of craft to and from the ship or vessel") is inserted — a difference in favour of, rather than against the loading risk (see Lowndes on Marine Insurance, 101). I have been unable to discover any case decisive of the very point. In *Anderson v. Morice* the subject of the insurance was "rice," not "cargo of rice," and the dicta in that case as to the commencement of the adventure insured against are therefore not in point. It does not appear to me that if "cargo of wheat" is filled in as the subject matter of insurance in the defendant's policy that the risk during loading would be excluded. If it would be I think the form would have to be altered to prevent the exclusion of the loading risk in carrying out this particular contract. The two cases cited by the defendants have no bearing on the question. *Jones v. The Neptune Marine Insurance Co.* (L. R. 7 Q. B. 702) was an action on a policy which was styled by Blackburn, J., "a peculiar one," "an entirely new form of policy from beginning to end and applicable to freight only." The words "from the loading" were held not to cover anything before the completion of the loading, because of a special term of the policy as to the voyage being from Baker's Island. *Beckett v. West of England Insurance Co.* (25 L. T. N. S. 739) decided that in a policy on freight "at and from Lagos" for the homeward voyage the risk did not attach before the shipment of any of the homeward cargo. It was also objected that this insurance being f.p.a., if the

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cargo had been fully laden, and as much of it as was lost had been thrown overboard or destroyed on the voyage, the insurers would have been freed from liability under the average clause. The answer is that in that case the warranty against average expressly excepts the event—the stranding or sinking of the ship, which occasioned the loss. In other words the contract covers the loss in one event and excludes it in the other. IV. In order to give the plaintiffs an insurable interest sufficient to maintain this action it must be shown that the wheat on board the *Duke of Sutherland* at the time of its loss belonged to or was at the risk of Messrs. Morgan, Connor, and Glyde. If the wheat did not belong to them and was not at their risk, they suffered no loss by its perishing; the payment they made to the sellers was a voluntary payment, and they could recover nothing under their insurance with the plaintiffs. The plaintiffs also in this state of facts made a voluntary payment when they settled with Morgan, Connor, and Glyde, and having sustained no loss under the risk they undertook, have no insurable interest to support the contract now sued on. In this admittedly difficult enquiry we have for our guidance the decision of the Court of ultimate resort in England, after a remarkable conflict of judicial opinions upon a dispute very like the present, in the great case of *Anderson v. Morice* (L. R. 10 C. P. 58,609, and 1 App. Cas. 713). In that case three judges in the Court of Common Pleas held there was an insurable interest. The Court of Exchequer Chamber, by a majority of five judges against one dissentient judge, reversed the judgment of the Common Pleas, and the House of Lords was equally divided in opinion, so that the decision of the Exchequer Chamber against the insurable interest stands. If the present case cannot be distinguished from *Anderson v. Morice* the plaintiffs cannot recover. They can only succeed if there are differences taking their case out of the rule in *Anderson v. Morice*. There is a striking resemblance in the facts of both cases. The material part of the contract in *Anderson v. Morice* was—"Bought the cargo of rice per *Sunbeam* at 9s. 1½d. per cwt. cost and freight. Payment by sellers' draft on purchases at six months' sight with documents attached." In this case the contract was a verbal acceptance of the following offer:—"We further agree to supply a cargo of wheat for the *Duke of Sutherland* at 4s. 7d. f.o.b. Timaru, provided she has sailed from Algoa Bay for that port." In *Anderson v. Morice* the *Sunbeam* foundered when 8878 bags had been shipped, and 1400 or 1600 bags were wanted to complete the cargo. When the *Duke of Sutherland* was lost 10,500 bags out of a complete cargo of 13,000 had been taken on board. The buyer in *Anderson v. Morice* paid for the rice which was lost, as did also Morgan, Connor, and Glyde for the wheat, the difference being that in *Anderson v. Morice* the payment was made to fix the underwriters with liability, and in this case there has been no suggestion of any such motive for the payment. The *ratio decidendi* in *Anderson v. Morice* was really an application to the bargain in question of Lord Blackburn's well-known rule:—"When by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of these things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property" (Blackburn on Sales, 151). In the Exchequer Chambers, after pointing out that "risk and property generally go together," Mr. Justice Blackburn said—"We proceed on the ground that the *primâ facie* rule of construction is that the parties intended that the risk should become that of the buyer, Anderson, when and not till the whole lading was complete, so as to enable the shippers by getting the shipping documents to call on the buyer to accept and pay for the cargo, and that there is nothing in this contract to rebut the presumption that such was the intention" (10 C. P. 619). The same doctrine is thus applied by Lord Hatherley—"Now comes the question, what was it that was to be at the risk of Anderson? I apprehend that what was to be at his risk was what he had purchased. It appears to me that he was to be at the risk of the cargo, which was to be sent to him by the *Sunbeam*, and that the property would not pass until that thing was brought into existence which he had bought" (1 App. Cas., at p. 730). "I am quite unable to see how this rice, supposing the whole cargo of it when completed was to be at the risk of the vendee, can be said to have been at his risk when the thing he bought never had been brought into existence at all. The vessel unfortunately sank before the cargo of rice had ever been completed, and therefore the thing which was to be insured against had never come into existence, and of course the vendee had never acquired an interest in that which had never been in a state in which it could be tendered to him for his acceptance" (1 App. Cas., at p. 733). The conflict of judicial opinion in *Anderson v. Morice* was not so much as to the property in the rice having passed as with respect to the buyer having undertaken its risk during loading. The Court of Common Pleas no doubt decided that the property did pass to the buyer, but Lord O'Hagan was the only member of the Appellate Courts who held the same opinion. Mr. Justice Quain, in the Exchequer Chamber, and Lord Selborne, in the House of Lords, who were the other dissentient judges on appeal, held not that the property had passed, but that the plaintiff having insured on the motion of the seller and paid for the rice which was lost, it must be taken that the understanding was that the rice was all along at his risk, in which view Lord O'Hagan also concurred. Let us,

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then, see what are the points of difference between *Anderson v. Morice* and the present case. They are these—1. In *Anderson v. Morice* the ship was chartered by the seller, in this case by the buyers; 2. Under the contract before us the cargo was to be "f.o.b.;" and 3. An admission by Mr. Glyde, one of the buyers, to the seller's agent, whilst the wheat was in course of delivery, that it was at the risk of the buyers after it was put on board. There is another variance between the two contracts which may be noticed in passing, but which seems to me to be in form and not of substance. In *Anderson v. Morice* payment was by "seller's draft on purchasers at six months' sight, with documents attached," which was held to indicate that the property would not pass until the complete cargo had been supplied, and the bill of lading could be attached (see *per* Blackburn, J., 10 C. P. 618-9; and *per* Lord Hatherley, 1 App. Cas. 728). In the contract before us, nothing being said as to shipping documents (subject to the differences between the contracts to be presently discussed, and also to the sellers' hold on the cargo for the price) the property would pass a stage earlier than in *Anderson v. Morice*—viz., on the completion of the cargo, and before the signature of the bills of lading. The parties might, if they pleased, do without a bill of lading at all (see *Bowes v. Shand*, 2 App. Cas., at p. 483-4). Nothing being said in the contract as to the time of payment of the price (in the absence of any local usage as to credit), payment of the price in cash and delivery of the cargo would be concurrent conditions (Blackburn on Sales, 198-9; Benjamin, third ed., 581-667). In *Anderson v. Morice* the time of giving the bill for the price, and in the present case the time of payment had not come when the ship was lost. Turning, then, to the first difference between the two contracts. In *Anderson v. Morice* the *Sunbeam* was chartered by the sellers, and the price included the freight. There was no privity between the shipowner and the buyer, and the buyer had no control over the ship or the cargo during the progress of the shipment. It was the same as if the ship were the seller's own. In this case the *Duke of Sutherland* was chartered by the buyers. "The charter party," if I may adopt the words of Lord Cairns in *Bernston v. Strong* (L. R. 3 Ch. Ap., at p. 590)" was a charter of an ordinary kind, not making Morgan, Connor and Glyde even for the time the owners or hirers of the ship, but merely operating as by way of contract with the owners of the ship that they would carry wheat to a particular port." This chartering of the ship by the buyers (Mr. Symon argued for the plaintiffs) distinguishes the present case from *Anderson v. Morice*; it is the same as if the *Duke of Sutherland* was the purchasers' own ship, and consequently he sold the wheat vested bag by bag as it was put on board. I do not think the plaintiff's contention on this point can be more aptly put than in the words of Cotton, L.J., in *Mirabita v. Imperial Ottoman Bank* (3. Ex. Div., at p. 172):—"Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract—that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment be restricted by the terms of the bill of lading) shipment on board a ship of or chartered for the purchaser is an appropriation sufficient to pass property." (And then the Lord Justice proceeds to show how the vendor can prevent what would otherwise be a complete appropriation by taking the bills of lading in his own name. It must be borne in mind that the Lord Justice was dealing with the case of a complete shipment, and not of one in course of completion, and his judgment, though it states the plaintiff's argument, does not decide the point under discussion.) The rule in *Anderson v. Morice* may, as to this part of the case, be stated as follows:—"On the sale of a cargo of goods not specific to be delivered on board a ship chartered by the seller, the goods put on board to make up the cargo are not finally appropriated to the contract, and do not become the buyer's, nor are they at his risk until the cargo is complete. To this rule, the plaintiffs say, must be added a second—that when the ship is chartered by the buyer the goods are appropriated to the contract, and become the buyer's, and are at his risk as they are put on board, and before the completion of the cargo. I have been unable to discover any authority for this addition to the rule in *Anderson v. Morice*. It is contrary to the words of the contract under which the buyer agrees to take a cargo, but does not agree to take part of a cargo. It is opposed to the rule in *Appleby v. Myers* (L. R. 2 C. P. 651), adopted in *Anderson v. Morice*, that where payment is to be made on completion of a contract nothing can be recovered when completion is prevented by an accident for which neither party is to blame. It also disregards Lord Blackburn's rule (also adopted in *Anderson v Morice*), which is as applicable to goods to be put "into the state in which the purchaser is bound to accept them," by their being loaded on board the buyer's ship, as by their being loaded on board the seller's ship. Let us apply the plaintiffs' rule to an analogous case. I sent to a shop for a bottle full of oil or a sack full of wheat, and by some accident, as the bottle or sack is being filled, and before it is full the bottle is broken, or the bag rent, and the oil is spilt, or the wheat wasted. According to the plaintiffs, the loss of the oil or the wheat will be mine if I sent my own bottle or my own sack to be filled, but the shopkeeper's if the bottle or the sack belonged to him. The cases appear to me to establish that the loss in either case is the shopkeeper's. It seems to be overlooked

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by the plaintiffs that in the cases put the bottle, the sack, and the ship serve two purposes at different stages of the transactions. In the first or executory stage they are receptacles for measuring and distinguishing what, when the goods are in "a deliverable state," are to be finally appropriated to the contract. In the second or executed stage they are the receptacles for what is finally appropriated to and deliverable under the contract. It is at this second stage only that the ownership of the receptacle becomes material with respect to the delivery and possession of the goods. This seems to me to be in no way inconsistent with *Aldridge v. Johnston* (7 E. & B. 885); or *Langton v. Higgins* (4 H. & N. 402); see also *Brians v. Nix* (4 M. & W. 775); and *Ogg v. Shuter* (L. R. 10 C. P. 159, reversed on appeal, 1 C. P. Div. 47). The loading of a ship cannot ordinarily be accomplished *uno ictu*, and accordingly there are numerous decisions as to what acts in the course of a shipment will amount to an appropriation of goods under a contract of sale. The cases are well summarised by Mr. Campbell in his work on "The Sale of Goods":—"Shipment is a complex act comprising the collection and preparation of the goods, bringing them upon the wharf where the ship is loading or by lighters alongside a vessel at anchor, hoisting and storing them on board, and finally the decision of the shipper as to the disposal of them. It may be stated generally that where a contract is made for goods to be shipped it is the completion of the shipment considered as an entire act and not the doing of any one or more of the acts necessary to a shipment that determines the appropriation of the goods. As a general rule, not only the right of property but the right of possession and (generally speaking) the existence of the goods as specific identifiable things dates from the completion of the act of shipment . . ." The determining circumstance is the intention of the shipper; the critical epoch is the completion of the act of shipment by the shipper obtaining the captain's signature to the bill of lading. "*Primâ facie* the intention of the shippers in delivering the goods on board is that they should be carried by the captain as bailee for the person indicated by the bill of lading, and this whether the ship is a general ship, a ship chartered by the consignee, or even the consignee's own ship" (Campbell on "Sale of Goods and Commercial Agency," pp. 238, 239, 265, 266). "The cases," says Baron Bramwell, "seem to me to show that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him" (*Gabarron v. Kreeft*, L. R. 10 Ex., at p. 281). Now, when the *Duke of Sutherland* was lost, "the critical epoch—the completion of the act of shipment"—whether by completion of the cargo or by the signing of the bills of lading, had not arrived. To select a case in which like this the ship had been chartered by the sellers, let us suppose that, as in *Ellershaw v. Magniac* (6 Ex. 570), the sellers had, before the loss, found themselves unable to complete the cargo. Unless the buyers first elected to take a part cargo as a complete one, the sellers could have changed the destination of the wheat already on board and obtained a bill of lading for it in their own names. In that event the title of a second buyer from them would be good against the first. This is only one of many illustrations which might be selected from the decided cases that all that had been done when the ship was lost amounted to nothing more than preparations to carry out the contract, and did not change the property, as the wheat was already on board. And this brings me to consider the observations of Mr. Justice Blackburn (10 C.P.) that the fact that the vessel was designated, and that, unless under exceptional circumstances, the seller could not, without the consent of the shipowner, take any goods once on board out of her, affects the question as between the vendor and purchaser. The Court below say that putting any rice on board the *Sunbeam* was such an appropriation of the rice on board as to prevent the sellers from withdrawing the rice without the "consent of the buyer." If we could see anything in the contract to give the buyer a right to object we should think it indicated an intention that the property so put on board should be at the buyer's risk; but we cannot find anything to that effect. If we could see anything to indicate an intention that as each bag was shipped it should be at the buyer's risk we should think it indicated an intention that it should not be taken out without his consent. But we cannot reason in a circle. We have therefore come to the conclusion that no part of this rice ever was at the plaintiff's risk, and that he never could have been called upon to pay for it, notwithstanding its loss. There is nothing in the contract before us (unless it is to be found in the second or third points of difference between this case and *Anderson v. Morice*) giving the buyers a right to prevent any of the wheat once placed on board from being withdrawn. The circumstance that the buyers of the wheat were also charterers of the ship was extrinsic to and independent of the contract. The sellers would have been as much bound to deliver a cargo on board the ship designated in the contract if the buyers, instead of being charterers, were owners, or if (being neither charterers nor owners) they had simply contracted with some other persons to fill her with wheat. Taking the case put by Lord Hatherley (1 App. Cas. 732), if the sellers, having another ship to fill in a shorter time, wanted to transfer to it say 500 bags from the *Duke of Sutherland*, and were still able to fill the *Duke of Sutherland* within a reasonable time under the contract, what

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right would the buyers have to object? No, the sellers would have to arrange with the master as to the terms on which they could take away what they had put on board towards her loading. No doubt, also, the buyers could put pressure on the master to induce him to withhold his consent. They could say to the master, "As between you and us the sellers are our agents for filling your ship, and we object to any of the wheat you have received being transferred to the other ship." This, however, would be an objection by reason of the charter party, and not under the contract with the sellers. But supposing in spite of these objections the master consented to the removal of the 500 bags, and the loading was still completed within a reasonable time under the contract, could the buyers refuse to accept the cargo because of the 500 bags having been transferred to the other ship? *Borrowman v. Free* (4 Q. B. D. 500) is an authority, if one be required, that they could not. I am unable, then, to find in the mere circumstance that the *Duke of Sutherland* was chartered by the buyers any indication that the wheat was to vest in the buyers bag by bag as it was put on board, or to be at their risk before the completion of the cargo. 2. Does the term of the contract that the cargo was to be "f.o.b." (free on board) according to the interpretation of the phrase in the reported decisions, and without the aid of extrinsic evidence, alter the case in the plaintiffs' favour? If it were shown that in the grain trade or in New Zealand there is a well-understood usage that on the sale of a specific quantity of wheat, to be delivered f.o.b., the wheat as it is laden vests in the buyer sack by sack, or is at his risk, it would be a good and binding usage, which is the same thing as saying that an express agreement to that effect would be valid (as to which see *Castle v. Playford*, L. R. 7 Ex 98). No such usage or agreement has been proved, but both parties are agreed that the expression "free on board" means that the goods to which it is applied are to be at the buyer's risk immediately they are shipped. The controversy is, that according to the plaintiffs the letters f.o.b. mean that the buyer's risk begins when goods are placed on board ship preparatory to the completion of a contract for sale, and according to the defendants the letters f.o.b. do not operate until the subject matter to which they are to be applied comes into existence, in other words that they only apply to specific goods. Bearing in mind that the use of the expression f.o.b. has over and over again been held insufficient to prevent the vendor from taking the bill of lading in his own name and otherwise retaining the *jus disponendi* over the goods (as to which it will be sufficient to cite only *Ogg v. Shuter*, 1 C. P. D. 4), let us see what meaning has been placed upon the expression in the English Courts. In *Cowasjee v. Thompson* (5 Moore's P. C. C., at p. 173), Lord Brougham, in delivering the judgment of the Judicial Committee, says: "It is proved beyond all doubt—indeed, it is not denied—that when goods are sold in London 'free on board' the cost of shipping them falls on the seller, but the buyer is considered as the shipper." The goods in litigation before the Judicial Committee were a completed shipment, that is, specific goods; as also were the goods in contest in *Brown v. Hare* (3 H. & N. 484—4 id. 822); and so far as I can discover in all the cases turning on the use of the letters f.o.b. which had been reported up to the time of the argument in this case. Since then the report of the case of *Stock v. Inglis*, before the Court of Appeal (12 Q. B. D. 564), has been received in the colony, and that case deals with this very point. The Master of the Rolls (at p. 573) says: "If the goods dealt with by the contract were specific goods it is not denied but that the words 'free on board,' according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; and in that case the goods so put on board, under such a contract, would be at the risk of the buyer, whether they were lost or not on the voyage. Now, that is the meaning of these words, 'free on board,' in a contract with regard to specific goods, and in that case the goods are at the purchaser's risk, even though the payment is not to be made on the delivery of the goods on board, but at some other time, and although the bill of lading is sent forward by the seller with documents attached in order that the goods shall not be finally delivered to the purchaser until he has either accepted bills or paid cash." According, then, to the custom of merchants the words "free on board" mean, when applied to specific goods, that they are at the buyer's risk as soon as shipped. If, therefore, we look at the words of the contract it is a "cargo" which is to be "free on board," or if we look at the understanding of merchants as to the same expression it refers to specific goods, and neither according to the words of the contract nor according to the custom of merchants does the expression cover the wheat which was on board the *Duke of Sutherland* at the time of her loss. In *Stock v. Inglis*, the Court of Appeal gave a larger effect to the letters f.o.b. than had been given to them in any previous case. In that case 390 tons of sugar were shipped f.o.b. at Hamburg, and on the passage to Bristol were to be apportioned between two contracts for sale of 200 tons each. Before the sugar was so apportioned the ship was lost. It was held that though the property in the sugar had not passed to the buyers, the sugar was at their risk, and they had an insurable interest. In other words, the expression f.o.b. was applied to goods which had not become specific, and the case is an authority that there may be a contract under which goods not completely appropriated to the contract, and

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therefore not technically specific, may, by the use of the letters f.o.b., be placed at the buyer's risk. Of course it may be remarked that in that case the sugar had not appropriated to the two contracts, and that all that remained to be done was to divide it between the two. Lord Justice Baggallay intimated that "if called upon to express an opinion at once" it would be that the provision f.o.b. would of itself place goods which were not specific as well as specific goods at the buyer's risk; but he and the other Lord Justices rested their judgment on the course of dealing between the parties, and in that particular business, as showing that it was intended by the use of the letters f.o.b. in the contract to place the incompletely appropriated goods at the buyer's risk. In the present case no such course of dealing was proved as was in *Stock v. Inglis*, and falling back on the contract alone there is nothing else to indicate that the wheat not finally appropriated to the contract is to be at the buyer's risk. It is said that this construction deprives the letters f.o.b. of any operation in this particular contract. That, however, is not the case, as the words mean, at all events, that the cargo is to be placed on board free of expense to the buyers; and, further, that it would be at their risk should there be any interval between the completion of the lading and the payment of the price. And it does not follow that because under different circumstances the words would have a more extended meaning that the fair construction of the contract should be altered in order to give these words the same meaning as they would have if the bargain were different. 3. I have last to consider if any understanding that the buyers were to undertake the risk of the wheat put on board whilst the cargo was being loaded is established by evidence outside the written contract. As I have already pointed out, this was the question upon which the conflict of judicial opinion in *Anderson v. Morice* chiefly arose. In this final step, as at each preceding step in this inquiry, I have had much difficulty in coming to a decision, and I recognise the force of the observations of the Master of the Rolls in *Stock v. Inglis* (12 Q. B. D., at p. 51)—"In my opinion it is the duty of a Court always to lean in favour of an insurable interest if possible, for it seems to me that after underwriters have received the premium the objection that there was no insurable interest is often as nearly as possible a technical objection, and one which has no real merit, certainly not as between the assured and the insurer. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits; but we ought, I think, to consider the question with a mind, if the facts and the law will allow it, to find in favor of an insurable interest." Hitherto on this branch of the case I have been endeavouring to ascertain the intention of the parties to the contract from the writing itself without the aid of extrinsic evidence. If the conclusion to which I have come, looking at the writing alone, is to be altered it is by the following passage from the evidence of Mr. Glyde, one of the members of the firm of Morgan, Connor and Glyde. After being referred to the letter containing the seller's offer of the wheat, he says: "I accepted that offer on behalf of our firm verbally. Before the 31st March the *Duke of Sutherland* had arrived at Timaru, and I then intimated to Mr. Stead (the agent and manager for the sellers) we should require cargo. He asked about the insurance—if I was going to insure there or in Adelaide—and I said "we insure everything in Adelaide." He urged me to insure in New Zealand, as he was director of the Union Insurance Company. The question arose when the wheat would be at our risk. One day a lighter load of wheat going off to the *Duke of Sutherland* got wet, and Stead wanted me to take this wheat, stating it was at my risk when it went off the wharf into the lighters. I said 'No; the wheat is not at my risk until it gets on board ship. I refused to have any responsibility on wheat until delivered on board ship, and then he said—'If you had insured in my company the risk would have been covered from shore to ship,' and asked—'Will that be the case with the insurance you have effected' I said 'No.' We did not accept the wheat that was damaged in going off.'" Now as to the effect of this evidence it must, I think, he admitted that if we had to find out what the bargain really was without the writing, Mr. Glyde's evidence would be most cogent to prove that the wheat was at the buyer's risk as it went on board. But we have not to deal with secondary evidence. We have the seller's offer, which (if the construction previously placed on it is right) did not impose any risk on the buyer until the cargo was complete. Mr. Glyde says—"I accepted that offer," and he says no more. Next, did the conversation as to the wheat damaged in the lighters vary the contracts? The seller argued that the risk began in the lighters. "No," said the buyer, "the wheat is not at my risk until it gets on board ship." This was really an argumentative admission with respect to a point not at that moment in controversy. A very little more said on either side would have altered the case. But we have to deal with what actually happened, and I fail to find in this conversation, as narrated by Mr. Glyde, any intention to vary the bargain, any proposal or acceptance of a new term as to property or risk. And yet it is plain enough that if we have already come at its right meaning the contract failed to express what the parties intended it to mean and what they both thought it meant. Let us, then, look back at the writing once more to see if what Mr. Glyde says throws additional light upon it. The letters f.o.b. are symbols of a term of the

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bargain not expressed in words, which do not explain themselves, and the meaning of which must be got at in some way outside the document. Up to this point, in trying to ascertain the meaning, I have confined myself to English mercantile usage, proved so often that judicial notice is taken of it. It was, as I have said already, competent for the plaintiffs to prove (if they could, and as they did not) a trade usage wide enough to cover the meaning they contend for; or, as in *Stock v. Inglis*, a course of dealing from which that meaning might be inferred. Lord Justice Baggallay says the letters mean what the plaintiffs say they mean, and the sellers and buyers might certainly use them and prove that they used them in that sense. Is it proved that they did? It is not proved that they used or did not use words when they were making the bargain declaring that such was the sense in which the letters f.o.b. were employed. But in carrying out their contract they acted as if that was their understanding of the meaning. As in *Anderson v. Morice*, the buyers insured the wheat so as to cover the risk during the loading, and paid for it when it was lost. And we have an additional fact (which was absent in *Anderson v. Morice*) in Mr. Glyde's admission to Mr. Stead during the loading that he understood the wheat to be at the buyer's risk as it was put on board—an admission, moreover, made *ante litem motam*. We do not know if this admission was based upon a trade usage, or upon previous dealings between the parties, or upon words used whilst the bargain was still in treaty—either of which might have been decisive as to the meaning the parties placed upon the term. But evidence of the usage, the course of dealing or the words, if such had been given, would only have been relevant to show (as might have been shown in other ways) the sense in which the letters f.o.b. were made use of. Is there any good reason why the admission may not be used for the same purpose, although we do not know the preliminary facts upon which the admission was based? If I had to ascertain from a jury the meaning of the letters f.o.b., as used in this contract, how could I withdraw from their consideration the admissions and acts of the parties as evidencing that the letters had the sense contended for by the plaintiffs? Can I act on that evidence? It was not only not contradicted, it was not challenged on cross-examination, although led for the purpose of showing the intention of the buyers and sellers with respect to the risk. I find, therefore as a fact that the letters f.o.b. in this particular contract were used with the meaning that the bags were to be at the buyers' risk immediately they were put on board, and it follows that the buyers had an insurable interest.

Judgment for the plaintiffs.

VICTORIA.

SUPREME COURT.

SITTINGS IN EQUITY.

(Before His Honor Mr. Justice Molesworth.)

Re ANDREW SINCLAIR. Oct. 2.

Insolvency Statute 1871 (*No.* 379), *sec.* 56—*A judge sitting in Chambers has no power under sec.* 56 *to appoint a new assignee to an estate in the event of the death of the first assignee. Such application ought to be made to a judge sitting as a Court—On an application for confirmation of a certificate of discharge notice should be given to the official assignee.*

MR. DUFFY had made an application for confirmation of a certificate of discharge granted in 1869 to Andrew Sinclair, of Fitzroy, butcher.

HIS HONOR said that in 1869 Sinclair sequestrated his estate. No creditors proved debts on the estate. A certificate meeting was afterwards held, at which there was no opposition to the grant of the certificate, but the certificate was not confirmed by the Supreme Court. The insolvent afterwards acquired property, but he had lately become embarrassed in making title to it, as he did not have a certificate of discharge from his debts, and he now desired that the grant of his certificate should be confirmed *nunc pro tunc*. In his affidavit in support of the application the excuse he made for not obtaining confirmation of the certificate was that his attorney advised him that it was not necessary. He (the judge) required an affidavit as to who this attorney was, and the insolvent made an affidavit that it was Mr. H. W. Turner, of 51 Little Collins-street east. He had directed his associate to write to Mr. Turner asking for his statement, but Mr. Turner had returned no answer. Under these circumstances he would take the excuse of the insolvent for not having obtained confirmation of the certificate. But there was another question involved in the application. It was usual in these cases to require notice to be served on the official assignee. There was no rule of Court requiring such notice to be given, but it was considered convenient, in the interests of the creditors, that notice should be given to the assignee, and that was the established practice. In this case the assignee first appointed, Mr. Goodman, had died, and an application was lately made to Mr. Justice Williams for the appointment of another assignee in his place. This application was made in Chambers, and an order was made in Chambers appointing Mr. Jacomb as assignee in place of Mr. Goodman, and notice of this application had been given to him. The sections of the Insolvency Statute, No. 273, relating to the appointment of assignees presented some difficulties. Section 50 empowered the Chief Justice to appoint official assignees generally, and he might, in case of death or resig-

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nation of an assignee, appoint another in his place. This section appeared to refer to the appointment of assignees generally as such, and which was considered to be within the special province of the Chief Justice. But section 56 gave to the Court power to appoint a new assignee to any estate in the event of the death of the first assignee. In this case, if the appointment of Mr. Jacomb had been made by Mr. Justice Williams, sitting as the Court, it would have been good, but at the time he made the appointment he was only sitting as a judge in Chambers. He therefore did not think that the appointment of Mr. Jacomb was valid, and that an application should be made to the Court for the appointment of an assignee, and when that appointment was made notice of the application for confirmation of the certificate should be given to him.

MR. WOOLF, in the absence of Mr. Duffy, now applied that Mr. Jacomb be appointed assignee.

HIS HONOR granted the application.

Solicitors, *Wyburn* and *Son*.

HASKER V. SUMMERS.

Assignee against wife of insolvent—Evidence necessary where wife of insolvent claims to be entitled to money in a bank in the name of the husband —Of crops upon land apparently farmed by the husband.

This was a suit by John Hasker, as assignee of the insolvent estate of Albert Summers, a farmer near Newbridge, to have it declared that certain land held by Mrs. Mary Summers, the wife of the insolvent, belonged to the estate.

MR. M'DERMOTT and DR. M'INERNEY appeared for the plaintiff; MR. HIGGINS and MR. ISAACS for the defendant.

HIS HONOR, in giving judgment, said: This is a suit by Mr. Hasker, assignee of Mr. Albert Summers, an insolvent, against Mrs. Mary Summers, the wife of Albert Summers, seeking to have it declared that the defendant is a trustee for the plaintiff of certain land transferred on October 15, 1883, by Mrs. Hannah Summers, the wife of a brother of Albert, to Mary, or that the said transfer was void as against the plaintiff. The land, prior to February 1, 1881, had been the property of the insolvent, who held a certificate of title, and who then assigned it to Hannah. The history of that transaction appears in a statement of Mr. Roseman, an agent of Hannah, which the parties have consented that I should receive in evidence without examining him (an arrangement of which I disapprove). According to him Hannah had become a creditor of Albert for £235, and on February 1, 1881, he as for that price sold it to Hannah, who obtained an absolute certificate of title; that she verbally promised him that he should be at liberty at any time afterwards to get a retransfer of the land upon payment of the principal sum and interest at 8 per cent; that she leased the land to him for £20 a year, and he occupied it, paying neither rent nor interest, and was otherwise indebted to Hannah; that Roseman was threatening to sell the land and get paid, but that he received £310 purchase money from Lamont, a solicitor, who prepared as for that price and a few shillings a transfer from Hannah to Mary. The detailed account shows how the sum was made up, debiting Albert with £235, rent at £20, an acceptance and interest, giving credit for Albert's labor for Hannah's husband, and some cash and bags. That price, £310, actually paid is marked as having been in fact paid by £265, a cheque of Albert on the National Bank of Australasia; £40, a cheque of Mrs. Buckley, handed by Albert, and which cheque was afterwards paid by Albert's cheque to Mrs. Buckley, and £5 which Mary alleges she borrowed from her sister, Mrs. Williams, but was actually paid by Albert. Albert was unable to pay his debts from 1880. He voluntarily sequestrated his estate on December 28, 1883, about two months after the assignment by Hannah to Mary. The bill charges that the assignment from Albert to Hannah was made with intent to defeat and delay his creditors, and that the consideration, £235, was not, in fact, paid, and that Hannah held the land on some trust for Albert. I think that assignment was an honest but misstated transaction, according to Roseman's statement a security for a debt. I rather think, it being apparently an absolute assignment with verbal promise to reconvey, was a scheme to conceal Albert's virtual equity of redemption in his subsequent dealings. The defendant's counsel have argued that the verbal promise to allow redemption was inoperative as against the law of perpetuities on the authority of the *London and South Western Railway Company v. Gourm*, 20 C.D. 562, in which it was held that in a conveyance in fee, containing a covenant that the purchaser, his heirs, and assigns would at any time reconvey to the vendor on payment of the purchase money, the covenant to reconvey was not binding on the assignee of the vendor; that was not a decision that the covenant was void against the vendor. I have no doubt that, according to the facts, a court of equity would hold Albert entitled to redeem against Hannah; at all events, it is plain that Hannah conveyed to Albert's wife the debt, as his nominee, from a right of redemption recognised, because she got the debt due to her paid. There is no allegation that she had any wish to benefit Mary. The land was about double the purchase-money in the deed of October 15th, 1883. I do not think that Hannah and Mary had any communication in the matter. The case made by the defendant is that Albert, in this purchase from Hannah, acted as her agent, and bought in fact with her money, and so he says. Hannah is said to be in a state of health disqualifying her from giving evidence. Lamont, ordinarily Albert's solicitor, acted in preparing the

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transfer instructed by him, only without communicating with Mary. After the insolvency he, as requested, prepared a bill of costs due by her, and was paid by his cheque. Roseman does not appear to have met Mary in the transaction, or to have supposed it to be hers. She says she borrowed the £60 from Mrs. Buckley. Mrs. Buckley is not called as a witness. She says she borrowed £5 from her sister, Mrs. Williams, who is not called. The bulk of the purchase-money, £310, is distinctly traced to Albert's bank account. But she and he sought to meet this by saying that Albert was her agent, acting by her directions, and with money virtually furnished by her; that the money in the bank to his credit was, as to the greater part of it, virtually hers; that it represented wheat, the produce of land virtually hers. We have a great many of these cases latterly, of husbands carrying on dealings in land or trade in which all the world supposed they were principals, but in which the wives come forward to claim property as acquired by the husbands as their agents really advised by them: and if they both swear strongly it is thought very harsh to disbelieve them. As to Mary's land and wheat, we have a long story. He had freehold estates, which by a voluntary conveyance in 1862 he granted to trustees for her separate use for life, without powers of anticipation, with powers of leasing, exchange, &c.; remainder to himself. Of the trustees two have died, the third is mentally incompetent. As far as I see the world saw this settlement was never acted upon. He acted as sole owner, made leases, got the rents as to a tenant named Malone, brought some action for damages, received and kept £30. As to a Mr. Whittaker, similarly, he got rent; she says all as her agent. At all events he got the produce of her property and maintained her, and according to *Caton v. Rideout* (1 M. & G. 589), and various other cases, was not accountable for past receipts. There were various and rather complicated transactions about this settled land. He raised money on the security of it from a bank, his interest was sold under an execution for his debt, and bought by a trustee for her. The land was bought under the Transfer of Land Act, and with her concurrence a certificate of title to it was issued in November, 1882, to Mr. Sharp, a nephew of Albert's, when the settlement, being voluntary, might have been defeated at her pleasure. Yet she might, as a trustee for I know not whom, have retained a power of claiming the land as hers. They say that, in fact, Albert farmed a portion of it as a trustee for her, and that wheat representing part of the £310 grew upon it. There was another farm rented from Mr. Thompson, as Albert and Mary say, apparently by Albert, but really as a trustee for her, and he had other land in the neighborhood confessedly his. He was the apparent tenant and owner of all equally. Thompson has not been produced to say he knew anything of Mary. Albert worked with his own hands on all, and from the quantity of wheat must have had other labor. Perhaps, upon inquiry, they might say they had accounts between them of all this; that as her agent he charged the settled and Thompson's land separately with labor bestowed on them, and devoted the wheat according to the land producing it. Albert and Mary are fortified so far by the cheques, &c., as to the connection between much of the money in the bank, that it was produced by a bill of a mill, representing probably some wheat. I think as to these cases made by wives as to the apparent property of their husband's money in bank to their credit or crops upon land apparently farmed by them that they should to prevent distrust and to obtain credence furnish accurate evidence besides their own. I have very positive evdience, produced in the awkward form of a rebutting case, from several neighbours, who observed the three lands in Albert's occupation, that all, or nearly all, the wheat produced at the time was not from the settled, or Thompson's land, but from that undoubtedly Albert's. I am unable to form any decided opinion upon this last rather complicated matter. If any of the dealings involved the payment to the wife of a supposed debt of the husband, she would find herself involved in the doctrine of preferential payments. The insolvent, in his schedule, described having assets £142; his unsecured debts, £750. The assignee, the plaintiff says, has got hold of assets (£800), but on the other hand, he is sued by a nephew of the insolvent as for £2000—I suppose in regard to what he has taken as assets. The answer puts forward no claim as against redundant assets. A pretty large margin should be left for assignees' costs, and I do not think it necessary to provide for defendant's claims on a surplus. In regard to the possibility of my having misconceived defendant's rights, and of her being disabled by poverty from bringing forward witnesses to support them, I shall not give costs against her. I shall declare that the transfer of the 15th October, 1883, in the bill mentioned, made to the defendant, Mary Summers, should enure to the benefit of her husband, Albert Summers, and that the property in the allotments therein mentioned was subject to his debts, and should be held to pass to the plaintiff, John Hasker, as his official assignee in insolvency, for the benefit of his creditors, and order that the said defendant execute a legal assignment of the said lands to the plaintiff, so as to make him the registered proprietor and owner thereof, the form of transfer to be approved by the chief clerk in case the parties differ, with liberty to apply; and order that further proceedings, so far as relates to form and manner of procedure, be continued and concluded as if commenced after the commencement of the Judicature Act.

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EQUITY JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

WISBEY V. CHURCHMAN. Sept. 22.

Land Act 1869 (*No.* 360), *secs.* 20 *and* 21—*Partnership in selections—Partnership in produce.*

MR. A'BECKETT for plaintiff. MR. HIGGINS and MR. WEIGALL for the defendant.

This was a suit by Wm. Wisbey, as administrator of the estate of John Wisbey, deceased, seeking to have it declared that a partnership had existed between John Wisbey and the defendant Churchman in reference to some selections at Lal Lal.

HIS HONOR said: In 1874, at the same time the defendant Mr. Churchman, Mr. John Wisbey, and Mr. Duncan made selections of adjoining lands in the district of Lal Lal, each about 319 acres, under the provisions of the Land Act 1869, the defendant took allotments 116 and 117, Wisbey 115, and Duncan 114. Leases were issued to these licensees August 1, 1877. On May 5, 1880, Wisbey, as for £675, assigned lot 115 to Duncan. The case presented by the bill seeking to establish a partnership between defendant and Wisbey, is that the three selected together under an agreement; that defendant and Wisbey should supply labor for improving the selections, and Duncan make all advances for payment of rent and purchase of materials; that immediately after the selections defendant and Wisbey began working on the allotments, fencing and improving, working together at different times on all the allotments, and obtaining money for materials, and food, and other requirements from Duncan, with whom neither had separate dealings, and who paid all the license fees. The bill then states that after the issue of the leases it was agreed between the three lessees that the accounts between Duncan and the other two should be adjusted by Wisbey transferring to Duncan the lease of lot 115, and that defendant and Wisbey agreed between themselves that in consideration of Wisbey discharging their indebtedness to Duncan by the transfer Wisbey should have an equal share with the defendant in lots 116 and 117, and that they should carry on business thereon in partnership, and that they did accordingly. The defendant's case denies all this. He says that he selected lots 116 and 117, worked on them, entitled himself to the lease, and was never a partner of Wisbey. Defendant was married to Wisbey's sister. He admits that between 1874 and 1877 they worked sometimes together, sometimes separately, on their respective allotments as an exchange of friendly offices. He says that he had nothing to do with the bargain between Duncan and Wisbey, which regarded claims for labor of Wisbey upon Duncan, and some claims for wages of dummyism, which Duncan repudiated. He admits that Wisbey lived on the land with him, and was supported like a member of his family, and did some trifling work on the land, but he says he had fallen into bad health and could do but little, never as owner or partner, and was maintained as a matter of charity not of right. Wisbey died September 11, 1883. This suit was commenced April 2, 1884, by Mr. William Wisbey, as his administrator. Plaintiff's principal witness as to the earlier transactions is Duncan, whose story is very different from the case made to the bill. He says the three agreed to select land; that Wisbey and defendant did not want more than 100 acres each, and they agreed that he should have all the rest of the selection, he paying all rents and improvements; that he paid sums, four for lots 114 and 115, all licence fees for 115, and five for 116, some directly, some by settling accounts; that in January, 1874, he saw defendant and Wisbey working together sowing on lot 117, and preparing to put up building; that he was absent some time, and returned to live on his selection 114, on which no work had been done, when they were working together on 117, on which they had all the improvements; that he then directed them to fence 115; that they did part, he the rest; that they did nothing on 114; that they worked on 117 and 116; that he and his family were there from 1875; that he advanced them money, and from time to time paid them for their labour. But on cross-examination it appeared that his actual dealings and payments were generally with Wisbey, but he says that he settled accounts produced for 1875 and 1876, some definitely for work and materials on allotments other than 114, and that he paid the money on a table before both. He kept the accounts. He regarded himself as dealing with them jointly. Then as to the transfer from Wisbey to him, all the direct dealing was between him and Wisbey, though he thought the defendant approved of it. When he asked for a settlement about the leases they both first totally denied his rights. He asked then for what he expended. Wisbey afterwards told him he had talked over with the defendant, and would try to settle. He says that the £675 was little more than he had expended and labor on 116, 117, and 115. That part of the arrangement with Wisbey included his giving up his claim to 116 and 117. This evidence of Duncan would, if adopted, show an illegal joint contract as the basis of the dealing on acquisition of 116 and 117, discharge of Duncan's claim by Wisbey and defendant, Wisbey's title being a continuance of the illegal dealing, and the partnership afterwards in a great degree a continuance of the joint dealing originating in the illegal bargain. I would certainly hold that the original illegality should preclude plaintiff from claiming the 116 and 117 land. As to produce of that land, if *de facto* partnership property, I should be embarrassed as to giving relief as to it. The plaintiff's case as to the original joint speculation is a good deal fortified by defendant's wife having cooked for men employed generally on the allotments, and paid by Duncan. There is a letter from him to Duncan, in the names of both Wisbey and defendant, June

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3, 1875, which looks as if they were both in a manner in his employment, and guarding a common interest. It informs him of the danger of loss of all the block by neglecting improvements, and asked his directions as to what fences should be put up, saying that they would not like the wall elsewhere, as they were holding blocks of selected land; that they were very hard up for money, and could not buy horse food. As a letter from defendant it was quite inconsistent with the independent position which he says he held with Duncan. He was not asked to explain all this. There is nothing very clear as to partnership or no partnership in the manner in which Wisbey lived with defendant's family. To the world generally defendant seemed sole manager and owner. A very strong point in favour of the partnership was that in August, 1877, just after the issue of the leases, a joint banking account was opened in the names of defendant and Wisbey, on which they both drew. The defendant afterwards mortgaged 116 and 117, and brought the mortgage money into that account. Defendant says Wisbey put in £20 only by way of safekeeping, having no account of his own, and other moneys after, and that other money was lodged by Wisbey merely as his messenger; that he drew the £20 out. Defendant knew all about the items of this account, the plaintiff nothing. If the defendant's assertion is true, he should be able, item by item, to show how the £20 went, and throughout by whose cheques the account was drawn upon. In February, 1882, that account was closed, the balance being brought to defendant's sole account. That would appear to show that Wisbey renounced all claim upon it, but the defendant gives no evidence of the manner of that transaction, which he knew all about, the plaintiff nothing. There is evidence about 1878 of a waggon purchased, and having, or being intended to have the name of Churchman and Wisbey upon it, but there is nothing distinct in it. There is more evidence of Churchman's name only being on it. There is evidence of goods having been furnished to Churchman and Co., very material as affecting the defendant. The plaintiff himself gives evidence that in October, 1881, he was at the residence of his brother and the defendant, when the defendant told him to write to the place, on 116, where his brother and the defendant lived, and defendant told him to address letters to Churchman and Co., and gave as a reason because they were in partnership, and that he was better known, and did the business of buying and selling, but they were halves in everything about the place. The defendant denies this. It might be a reason for directing Wisbey's letters to the care of Churchman and Co. That is not what plaintiff said. The plaintiff gives evidence about a dam, then a conversation between Wisbey, him and his wife, and defendant; that Wisbey said to his wife, "is not that a fine waterhole we have here; that cost us a lot of money. Did it not?" (to defendant). Defendant said, "Yes, but we have the benefit of it." Plaintiff's wife corroborates him as to this. Defendant denies it. His wife was not asked about it. There is evidence of several neighbours speaking with John Wisbey, and his telling them of his inability to work, and being a great trouble and expense to his sister and her husband, and that but for their kindness he would not have known what he should have done for the last few years. As a decrepit man not worth his support he might have said this, although a partner in farm property. I think there is a preponderance of evidence for the plaintiff as to Wisbey's dealing conjointly with defendant, as to Duncan, and as to their having been jointly interested in 116 and 117, and as to their having been joined in a banking account. Defendant denies everything. If the denial had been confined to the latter part of John Wisbey's life, I should find it hard to say there was evidence of continuing partnership. On the whole, I have, with very much doubt, come to the conclusion that plaintiff, as administrator, should be held entitled as a partner. As to relative credibility, plaintiff is seeking a property which he will hold beneficially for a share only, and that, he says, he does not intend to keep. Defendant is trying to keep all for himself. In *Porteous v. Oddie* (3 V.L.R. 148) a similar question as to illegality of bargain came before me under the Land Act 1862. I there held I could not assist a plaintiff as to title to land. The question was raised there as to sharing profits of an actual partnership on the land. Here I think I should hold plaintiff entitled to half of the partnership property on the land at John Wisbey's death, as his administrator, but I do not think I should follow that up as to subsequent produce of the land. As to the furniture of the house, I collect that John Wisbey came to live with the defendant before keeping house, and therefore that the furniture was not partnership property. I see much probable difficulty in going into partnership accounts, and am inclined to let John Wisbey's maintenance go against partnership profits before his death, and as to debts due to or from the farm business at the time of the death I shall leave them to be set off. Declare that the deceased John Wisbey should be deemed to have been carrying on an equal partnership business with the defendant, Joseph Churchman, at the time of death on allotments 116 and 117 in bill mentioned, and to have been entitled to a moiety of the cattle and other live stock, farming plant, horses, drays, carts, and farming implements thereon, and also to any produce of the said allotments then severed, being thereon then, and that the plaintiff, William Wisbey, as administrator of the said John Wisbey, should now be entitled thereto, or to the produce thereof, if sold by the said defendant since. Refer it to the chief clerk to take an account of said cattle, &c., and of the sums for which the said

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defendant should be held chargeable in respect thereof, and to certify the same. Reserve further directions and costs. Order that further proceedings, so far as relates to the form and manner of procedure, be continued and concluded as if commenced after the commencement of the Judicature Act.

Re HUNT (INFANTS). Sept. 22.

Infants—Appointment of guardian—Maintenance ordered out of the income, but not out of the corpus.

MR. FORLONGE applied for an order for the appointment of a guardian of five children, whose father, Thomas Hunt, had died intestate. His widow, who had obtained administration to his estate, now applied to be appointed guardian of the children, and that a sum of money should be allowed for their maintenance as well out of the *corpus* as the income of the property.

HIS HONOR said he would make an order appointing the administratrix as guardian, and for payment of maintenance out of the income, but not out of the *corpus*.

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

Sept. 25.

IN THE WILL OF HARRINGTON.

Probate—Where will is headed A.B., senior, and the will is signed A.B., Held, *this is a good signature.*

The will was headed as follows:—"This is the last will and testament of Abraham Harrington, senior." The testator executed the will as "Abraham Harrington."

MR. WOOLF, for the executors: The Registrar has taken the objection that there is a discrepancy between the name at the head of the will and the signature. The word "senior" is only a mark of distinction and is not part of a man's name. The will was properly signed.

HIS HONOR granted the application.

Proctor, *Gaunson.*

IN THE WILL OF DAWSON. Sept. 25.

Probate—Where testator appoints executors and his widow executrix so long as she remains his widow probate will be granted to widow with leave reserved to the executors.

The testator by his will appointed certain persons executors of his will and his widow as executrix during widowhood.

MR. A'BECKETT applied for probate to the widow leave being reserved for the executors to come in and prove.

HIS HONOR granted the application.

Proctor, *Michie.*

IN THE WILL OF HASSELL. Sept. 25.

Letters of administration with an exemplified copy of will granted to the attorney of executor—Affidavit as to property in the place where probate was granted—Administrator of an exemplified copy of the will who does not reside within the jurisdiction must give security.

Application for letters of administration with an exemplified copy of the will annexed to the eldest son of the testator.

The testator resided in Western Australia, and by his will appointed his widow as sole executrix during her lifetime, and his children executors after her death.

DR. DOBSON for the applicant: The present applicant is the eldest son of the testator, and one of the executors appointed after the death of his mother. The applicant has a power of attorney for his mother, and applies under that power.

HIS HONOR: The affidavit does not state the amount of the testator's property in Western Australia, when probate was granted to his will.

DR. DOBSON: There is a general averment that the testator had property in Western Australia, and the will shows that he had.

HIS HONOR: I will grant the application, but as the applicant does not reside in the colony, and apparently has no intention of so residing, I will require him to give security.

Proctors, *Klingender, Charsley* and *Dickson.*

IN THE WILL OF GITHENS. Sept. 25.

Probate—Name of executor mis-spelt in the will—Affidavit.

The testator by his will appointed one Patrick Moylon as executor. The executor applied for probate under the name of Patrick Mylon. No affidavit was filed stating that the applicant was the person mentioned in the will.

MR AMESS for the applicant.

HIS HONOR said: I must refuse this application. I will require an affidavit as to the applicant and the executor being the same individual.

Proctors, *Brown* and *Ellison.*

IN THE WILL OF GORDON. Sept. 25.

Under a will by which no executors are appointed, the Court will grant administration with the will annexed to a legatee where there are no next-of-kin.

The testator left a will to the following effect:—"After payment of my just debts I give £100 for the benefit of Court Sherwood Forest, £150 to Mrs. Langhorn, and the residue for employment for three weeks off and on with——." No executors were appointed.

Mrs. Langhorn, with the consent of her husband, applied for probate as executrix according to the tenor, or for letters of administration with the will annexed.

DR. M'INERNEY, for the applicant: The affidavit of the applicant states that the deceased was unmarried and left no next-of-kin surviving him in the colony of Victoria or elsewhere as he informed me.

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HIS HONOR said: The applicant is clearly not an executrix according to the tenor. As there are no next-of-kin I will grant letters of administration with the will annexed.

Proctor, *Best.*

IN THE WILL OF SCHNEIDER. Sept. 25.

Probate—Advertisement appearing nine months prior to the application.

Application for probate to the executors. The advertisement was inserted in a newspaper nine months previous to the application, and no affidavit was filed explaining the delay.

MR. M'ARTHUR for the applicants.

HIS HONOR said: Nine months is too long a time to elapse between the advertisement and the application. I will require a fresh advertisement to be inserted. I refuse the application.

Proctor, *Gaunson.*

PRACTICE COURT.

(Before His Honor Mr. Justice Williams.)

Sept. 5.

Re O'CONNELL AND THE TRANSFER OF LAND STATUTE.

Mandamus—*Transfer of Land Statute* 1866 (*No.* 301), *sec.* 132—*Circumstances under which the Court will grant a* mandamus *calling on the Registrar of Titles to call in a certificate of title, or to give his reason for not doing so.*

Rule *nisi* for a *mandamus* calling on the registrar of titles to show cause why he should not give his reasons for refusing to call in a certificate of title granted to one O'Connell for some land at Footscray, or why he should not call in the certificate. In 1861 a person named Merrick owned some land at Footscray. He died in April of that year. By his will he devised the property to his wife. In December of the same year Mrs. Merrick conveyed to Messrs. Hodgson and others the "unsold land" that her husband had owned at Footscray. That conveyance was registered. The land was afterwards conveyed to other persons, the different allotments being specified in the several conveyances. Amongst others was one known as allotment 20, which had come into the possession of an investment society. That society lately desired to deal with allotment 20, but then discovered that a certificate of title to it had been granted to O'Connell. It appeared that in April, 1854, Merrick had entered into a contract to sell this land to a person named M'Carthy. This contract was, however, not registered till the 17th July, 1874, and immediately afterwards a transfer by M'Carthy to O'Connell was given, and the latter received a certificate of title, which the registrar had since refused to call in, and he had refused to give any reasons for his refusal.

MR. HIGGINS moved the rule absolute; MR. WORTHINGTON showed cause.

It was contended for the registrar that the application should not be granted. Section 132 of the Transfer of Land Statute provided that in case it shall appear to the satisfaction of the registrar that any certificate of title has been issued in error, or contains any misdescription of the land or boundaries, or that any entry or endorsement has been made in error, or that any certificate has been fraudulently or wrongfully obtained, the registrar might apply to have the certificate called in. In this case the registrar was not satisfied that the case came within any of these provisions.

HIS HONOR said that he should refuse the application, as it was not proved to him that it appeared to the satisfaction of the registrar that the certificate had been issued in error, or contained a misdescription of the land, or had been fraudulently or wrongfully obtained.

Rule for a *mandamus* discharged, with costs.

(Before His Honor Mr. Justice Holroyd.)

REG. v. JOSEPH, *Exparte* OLIVER. Oct. 7.

Local Government Act 1874 (*No.* 506), *sec.* 107—*An election to fill an extraordinary vacancy must be held within twenty-five days of such vacancy—"In the Supreme Court" is a sufficient heading in an application to oust a councillor.*

Rule *nisi* to oust one Jacob Joseph from the office of councillor of the west riding of the Shire of Lowan.

The affidavits stated that a councillor, Gavin Douglas, whose term of office did not expire until the 14th August, 1885, resigned on the 15th July last, thereby creating an extraordinary vacancy in the council. An ordinary vacancy occurred on the 14th August by the retirement of Councillor F. T. Moore, whose term of office had expired. The returning officer on the 24th July published a notice that a certain election would be held on the 14th August for the election of two Councillors to fill these two vacancies, nominations to be made on or before the 29th July. After that notice, Oliver had a nomination paper sent in, in which he had himself nominated to fill the extraordinary vacancy caused by the resignation of Douglas. Moore, Joseph, and Jackson were all nominated generally in accordance with the form given in Schedule 10 of the Local Government Act. Oliver then served a notice on the returning officer, calling upon him to declare him (Oliver) duly elected to the extraordinary vacancy as being the only candidate nominated. The returning officer refused to do so, and the result of the poll was that Moore received 321, Joseph 283, Jackson 100, and Oliver 17 votes. The returning officer then declared Moore and Joseph duly elected.

SIR BRYAN O'LOGHLEN, to show cause, took a preliminary objection to the way in which the Rule was headed—"In the matter of the Local Government Act, 1874, and of a vacancy in the Shire of Lowan"—and contended that the proper heading

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was, "*Reg.* on the relation of *Joseph, ex parte Oliver*" (*Reg. v. Jones, ex parte D'Arcy*, 5 V. L. R. 334 (L.). This case was under the 71st section of the Local Government Act, but there was no discussion on this point.

His Honor said: The word "party" is used in that section; that seems to show that it is a kind of suit. I do not see how you can call a "relator" a "party." The Queen is not mentioned in the section. The section gives the Court power to award costs. A "party" would have to pay costs, but a "relator" would not.

Sir Bryan O'Loghlen stated that the objection had been taken as one which would affect the question of costs, and continued: The Rule is taken out under secs. 106 and 107 of the Act. Sec. 107 is directory merely. The election is either regular or irregular, and if irregular it ought to be set aside altogether.

Dr. Madden, in support of the rule: The only candidate properly nominated was Oliver. The election, if it ought to have been held for the extraordinary vacancy, was not held within 25 days from the occurrence of the vacancy as required by section 107, and the returning officer did not give the proper notice under section 122, and if the rule had been headed, "In the Supreme Court" merely, it would have been sufficient (*Re Bell, ex parte Slater*, A. R. 23rd March, 1861).

His Honor, in delivering judgment, said: Section 107 of the Local Government Act shows that an election to fill an extraordinary vacancy must be held within 25 days after the occurrence of the vacancy, which was not done in this case, and, therefore, I think the election was bad. There is another difficulty in the matter, viz., that there is nothing to show to what vacancy each councillor was elected. As there is nothing in the Act to show that applications of this kind should have any particular heading, I am of opinion that the heading "In the Supreme Court" would be sufficient. I will make the rule absolute, with costs.

Solicitors: For Oliver, *Mornane;* for Joseph, *Levinson.*

IN CHAMBERS.

(Before His Honor Mr. Justice Holroyd.)

Andrew v. Figg and Others.

Oct. 7.

County Court Statute 1869 *(No.* 345*), secs.* 100, 103.

A suit for redemption in which the sale of the mortgaged hereditaments is sought to be set aside is within the jurisdiction in equity conferred upon the County Court by sec. 100—*A judge has a discretionary power under sec.* 103, *and will not order an action to be transferred to the County Court, if he think it a proper one to be tried in the Supreme Court.*

Application under sec. 103 of the County Court Statute on behalf of one of the defendants that the action be transferred from the Supreme Court to the County Court on the ground that the action might have been commenced in the County Court.

The plaintiff claimed against Harriette Figg to set aside an alleged sale by Edward Figg to her of property referred to a mortgage, and to have an account of what, if anything, was due on an equitable mortgage alleged by Edward Figg to be made between one Robert Andrew and Edward Figg, and to redeem the property comprised therein or to set aside the said equitable mortgage; and for an injunction to restrain Richard Gibbs, the Registrar of Titles, from issuing a certificate of title to Harriette Figg in respect of the land comprised in the mortgage.

It was contended on behalf of the applicant that this was a redemption suit or action, and should have been commenced in the County Court, as the value of the property was under £200 (County Court Statute, sec. 100, sub-sec. (iii.); *Powell v. Roberts*, 39 L. J. Ch. 44); and that a further ground for transmission was that the plaintiff was without means. It was contended on behalf of the plaintiff that the County Court had no jurisdiction, as part of the application was to set aside a sale.

His Honor said: This is an application under sec. 103 of the County Court Statute 1869 to have an action transferred to the County Court, and the question arose as to whether the County Court had jurisdiction to try an action of this character. The case of *Powell v. Roberts* was cited, in which it was decided that the County Court has jurisdiction. I do not say that I differ from that case, but a judge has a discretion as to whether he will order an action to be transferred or not (*Linford v. Gudgeon*, L. R. 6 Ch. App. 359). In this case I am not certain whether an injunction ought to be granted against the Registrar of Titles, and the question as to whether the registrar is a necessary party is one of some difficulty. Under these circumstances I think the action a fit one to be tried in the Supreme Court. The affidavit says that the plaintiff is a person of no means; if the applicant had wished to have the action transferred on that ground he should have applied under section 43 of the Act. I dismiss the application without costs.

Solicitors: For plaintiff, *Pentland* and *Roberts;* for defendant, *Croker.*

(Before His Honor Mr. Justice Higinbotham.)

Paterson v. Luke. Oct. 11.

Interrogatories—When a party objects to answer an interrogatory on the ground that it may tend to criminate him, he must do so on oath.

Summons on behalf of the plaintiff for leave to deliver interrogatories on the defendant.

The interrogatories were as follows: 1. Did you at any time, or did any person or persons for you and by your instructions, print or cause to be printed certain slips reproducing an article set

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forth in the *Gippsland Mercury* newspaper, published on the 26th June, 1883, under the heading of "A Personal Explanation." 2. Did you or did any person or persons for you and by your instructions post or affix or cause to be posted or affixed the said printed slips containing the said article, or any of them, upon divers places at the sheep and cattle sale yards at Flemington during the month of August, 1883.

DR. MADDEN in support of the summons: The action is one for libel contained in a newspaper published by the defendant on the 2nd October, 1883. The slips, which were a reprint of an article which appeared in the same paper of a previous date, were posted on the fence of the Flemington Cattle Yards in August, 1883. The interrogatories asked for are for the purpose of showing malice.

MR. BOX objected to the interrogatories on the ground that the answer might tend to criminate the defendant. The slips have no printer's or publisher's name on them, and so the defendant, if he answered the interrogatories in the affirmative, would lay himself open to a prosecution under the Printers' and Newspapers' Statute 1884.

HIS HONOR said: *Smith v. Powell* (10 V. L. R. 79 (L.)) settles the practice on this point. If a person sought to be interrogated objects to answer on the ground that the answer may tend to criminate him he must take the objection on oath. The defendant has not done so in this case, and consequently his objection cannot be heard. I allow the interrogatories asked for. The interrogatories must be answered.

Solicitors: For plaintiff, *Vaughan* and *Derham*; for defendant, *Smith*.

(Before His Honor Mr. Justice Molesworth.)

HAYES V. WILSON. Oct. 15.

Judicature Act 1883 (*No.* 761), *sec.* 41. *Rules of Supreme Court* 1884, *Order XVI., r.* 40—*Service of notice of a decree upon interested persons residing out of the jurisdiction.*

Application to serve notice of a decree upon two persons interested who were residing out of the jurisdiction.

The question was as to whether there was any power to serve such notice upon persons out of the jurisdiction of the Court.

Reference was made on behalf of the applicant to the Judicature Act, sec. 41; Rules of Supreme Court 1884, Order XVI., r. 40; and to *Strong v. Moore*, 22 L. J. Ch. 917.

HIS HONOR said: I will grant the application. As the parties sought to be served reside in Sydney, I will fix six weeks as the time within which they may apply to vary the decree.

Solicitors: *Crisp, Lewis* and *Hedderwick*.

(Before His Honor Mr. Justice Holroyd.)

ROPER V. WILLIAMS. Oct. 16.

Interrogatories—Where in an action for libel interrogatories are delivered by the plaintiff as to the publication, &c., the defendant cannot insert in his answering affidavit matters which are intended as a justification for his conduct..

Summons on behalf of the plaintiff calling upon the defendant to show cause why he should not give further and better answers to certain interrogatories.

The action was for libel, and the plaintiff delivered interrogatories to the defendant concerning the publication, &c. The defendant in his answering affidavit stated that he did publish, &c., "in consequence of a violent, untruthful, and slanderous attack made by the plaintiff upon me reflecting on my honesty."

MR. ISAACS, in support of the summons: The defendant has given reasons for his action in his answering affidavit. This insertion of reasons is an excess, and therefore there is an omission to answer sufficiently and satisfactorily (*Peyton v. Harting*, L. R. 9 C. P. 9).

DR. QUICK, to oppose, contended that the answers were mere explanations of the defendant's conduct, and as such ought to be inserted.

HIS HONOR said: The defendant is asked a simple question. I do not think it is proper for him to add the justification in his answer. I do not think these answers are explanations. The plaintiff wants merely to know the fact as to whether the defendant did publish these matters or not. I have power either to order the defendant to give a better answer before a given time, or to order that the defendant be orally examined before myself or the Prothonotary.

DR. QUICK said that to avoid costs he was prepared to amend the answers by striking out the parts objected to.

MR. ISAACS consented.

HIS HONOR then said: The answering affidavit is to be read as if the parts objected to were struck out. Costs to be costs in the cause.

Solicitors: For plaintiff, *Cleverdon* for *Brown* and *Ellison*; for defendant, *Hornby* for *Crabbe*.

Oct. 16.

UNION BANK V. RINDERMAN.

Common Law Procedure Statute 1865 (*No.* 274), *secs.* 331, 334, 336, 339—*Imprisonment for Debt* (*Amendment*) 1865 (*No.* 292), *sec.* 2—*Common Law Procedure* (*Amendment*) 1865 (*No.* 290), *sec.* 4—*A writ of* "capias ad respondendum" *cannot be issued after judgment—A writ of* "capias ad satisfaciendum" *may be issued, but no one can be arrested on it—The word* "capias" *in sec.* 339 *of Act No.* 274 *is a writ of* "capias ad respondendum" *only.*

Summons on behalf of the defendant to set aside an order of Mr. Justice Holroyd's to hold the defendant to bail.

MR. HODGES, in support of the summons: The

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objection to the order is that no person can be arrested upon *mesne* process after judgment has been signed (Common Law Procedure Statute, secs. 331 and 334). This has been done in this case after final process. [His Honor: Is it not under sec. 336?] No; the order is to seize him and hold him to bail. The *præcipe* shows that it is not that form of writ. This writ is not to take the body of the defendant; but that "you take him and hold him to bail." This order has not been made under the terms of sec. 2 of the Imprisonment for Debt (Amendment) Act. This writ is a writ of *capias ad respondendum* and not a writ of *capias ad satisfaciendum*. This is shown by the amount on the writ being only the amount of the debt and not the amount of the judgment. Wherever the word *capias* is used in the books it means *capias ad respondendum*, and wherever *capias ad satisfaciendum* is meant they always give the addition "*ca. sa.*"

MR. HAMILTON, to oppose: The writ was intended to be issued under sec. 336. Sec. 339 provides that every writ of *capias* shall be in the form of the 31st schedule, and makes no difference between the two writs of *capias*. In England two forms of *capias* are given. Sec. 2 of the Imprisonment for Debt (Amendment) Act is at variance with sec. 336 of the Common Law Procedure Statute. Sec. 4 of the Common Law Procedure (Amendment) Statute provides that "no act passed during the last preceding session shall operate as a repeal by implication of any enactment in force at the time of the coming into operation of such act," so that sec. 336 of the Common Law Procedure Act is not repealed.

HIS HONOR said: This is a summons to set aside a writ, and that the defendant, who was arrested on such writ, may be forthwith discharged out of custody. The writ was defended under sec. 336 of the Common Law Procedure Statute as a writ of *capias ad satisfaciendum*, and it was urged that every writ of "*ca. sa.*" must be in the form given in the 31st schedule. It appears that a writ of "*ca. sa.*" may be issued, but that no one may be arrested on it. The arrest was certainly bad in this case. I think the application made to me was for a writ of *capias*. I certainly did not observe when I granted leave to issue the writ that the debt on which the writ was sought was a judgment debt. The word "*capias*" in section 339, which prescribes the form, is a writ of *capias ad respondendum* only. I think this present application should be granted. The writ to be set aside and the prisoner discharged. I say nothing as to costs. I will, however, give the defendant costs if he undertakes not to bring an action against the plaintiff.

The defendant's solicitor declined to take the costs on those terms.

Solicitors: For plaintiff, *Blake* and *Riggall*; for defendant, *Gillott* and *Snowden*.

(Before His Honour Mr. Justice Williams.)

Oct 18.

ROUND V. VICTORIAN STEVEDORING AND GENERAL CONTRACTING CO. LIMITED.

Rules of Supreme Court 1884, *Order XVI.*, *r.* 48, *does not apply to a case in which there can be no contribution or indemnity between the defendant and the party sought to be brought in as third party or where such party is resident out of the jurisdiction of the Court—Refusal of a judge to grant an application to bring in a third party on the ground of simplicity.*

Application under Order XVI., r. 48, for leave to issue a third party notice.

MR. HOOD, in support of the summons: The man whose representative is bringing the action was killed by the breaking of a rope, and we say that the party who supplied us with that rope ought to be joined as a third party. If the defendants are liable, the third party ought to be introduced. If the third party put in a defence denying his contract your Honor might direct that the actionss hould be tried separately.

MR. HODGES, to oppose: This procedure has been brought within the narrowest possible limits. This is a case of one wrongdoer seeking contribution against another wrongdoer, which cannot be done (*Speller v. Bristol S. N. Co.*, 13 Q. B. D. 96). Order XVI., r. 48, gives a defendant power to issue such notice only where he claims indemnity against another party. A person is only liable to be indemnified where there is a contract express or implied. The word indemnify must only apply where the third party has contracted to indemnify. There is another objection—the party sought to be served resides out of the jurisdiction. We have no power here to serve a third party notice on a person resident out of the jurisdiction. Order XI., r. 1, of the English Rules contains that power, but sec. 59 of our Judicature Act does not. Sec. 59 authorises the service of a writ of summons on the third party, but not the service of proceedings of all kinds, The Court has a discretionary power in applications of this kind, and the Court will not exercise its discretion where it would put the plaintiff to any delay. In our case there was no delay, because the plaintiff had to take out probate (*Bower v. Hartley*, 1 Q. B. D. 652).

HIS HONOR said: I am quite clear upon the point that this is not a case of contribution or indemnity, and so cannot come under Order XVI., r. 48. I think also that this application should be dismissed on the ground of simplicity—that is, I think it the better and simpler course for the defendant, if defeated in this action, to bring his action against the person he wishes to join as a third party. An objection has been taken to this application on the ground that there is no provision in our Act or Rules for service of a third party notice on a person resident out of the jurisdiction. I am strongly of opinion that Order XVI.,

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r. 48, does not apply to third party proceedings where the party sought to be brought in resides out of the jurisdiction; but I do not wish to base my decision on this point. I prefer to base it on the ground that this is not a case in which there can be contribution or indemnity, and on the ground of simplicity. I dismiss the application, and fix the costs by consent at 4 guineas. I certify for counsel.

Solicitors: For plaintiff, *Pentland* and *Roberts*; for defendants, *Croker*.

COULSON v. CAMPBELL. Oct. 18.

Judicature Act 1883 *(No.* 761*), sec.* 22—*Rules of Supreme Court* 1884, *Order XXXVI., r.* 6—*On an application to have an action tried with a jury a judge will not require an affidavit as to the nature of the action if the pleadings are produced—If the pleadings are not produced an affidavit is necessary—Power of a judge in Chambers to deal with the costs of an application under sec.* 22 *of Act No.* 761.

Application under Order XXXVI., r. 6, that the action be tried with a jury, and that the costs of and occasioned by the application be costs in the cause.

HIS HONOR said: I will grant the application for a trial with a jury, and I am of opinion that I have power under sec. 22 of the Judicature Act to deal with the costs, and will order the costs of the application to be costs in the cause. I will not grant applications for a trial with a jury without an affidavit as to the nature of the action unless the pleadings are produced. If the pleadings are produced I think an affidavit is unnecessary.

Solicitor for applicant: *Nathan*.

[See *Simmons v. Hall, ante* p. 45; and *Pralle v. Slater, ante* p. 70.—ED. *A.L.T.*]

SUPREME COURT.

SITTINGS IN EQUITY.

(Before His Honor Mr. Justice Molesworth.)

THE HOP BITTERS MANUFACTURING COMPANY AND OTHERS v. LUKE. Oct. 9.

Injunction—Trade mark—An injunction will not be granted to restrain the use of a trade mark where the words complained of are merely words of description and do not belong exclusively to one party.

Action by the plaintiffs against the defendant seeking for an injunction to restrain the defendant, his servants and agents, from infringing the plaintiffs' trade mark, and in particular from using the words "hop bitters" as descriptive of the bitters sold by him in conjunction with other words on his labels and cases calculated to convey the impression that the bitters sold by the defendant are the bitters manufactured by the plaintiff company; from using a label covering the cork and neck of the bottles in which he sells his bitters which was an imitation of the plaintiffs' label for that part of the bottle; from using a label on his bottles bearing the words "Hop Bitters; New York Hop Bitters Co.," so colored and arranged as to convey the impression that the defendant's bitters are manufactured by the plaintiff company; and from selling his bitters in cases resembling the plaintiffs', and bearing the words "Hop Bitters Co.," or any other words so arranged as to convey the impression that the contents had been manufactured by the plaintiff company. In his statement of defence the defendant denied that he had infringed the trade mark of the plaintiffs, or that the labels on his bottles had been so arranged as to deceive or mislead any incautious person as to the maker or manufacturer of the article in the bottle. The defence also as to the cases was that they were of the class and size in every day use for the conveyance of bottles in dozens, and had been in use for many years; that the words on the plaintiffs' boxes were "From Hop Bitters Company, Melbourne," and the words on the defendant's boxes were "New York Hop Bitters Co.," and the words on defendant's boxes were so painted and arranged as to prevent any person supposing or being deceived into the belief that the defendant's boxes contained hop bitters manufactured by the plaintiffs.

MR. WEBB, Q.C., and MR. A'BECKETT for the plaintiffs: The plaintiffs do not say that there is any similarity between the labels on the bottles. The cause of complaint is in the name "The New York Hop Bitters Co." The plaintiffs' goods are made in New York, whereas the defendant's goods are made in Melbourne. The only object the defendant can have in making use of the words "New York" is to lead people to suppose that his goods are manufactured by the plaintiffs. The defendant pretends that his goods are made by a company, whereas he is the sole manufacturer.

DR. MADDEN and MR. HODGES for the defendant: The plaintiffs' name is "The Hop Bitters Manufacturing Co." The defendant has never used the word "manufacturing." Persons buy by the bottle and not by the placard. The bottles are admitted to be distinct. The defendant has no desire to use the plaintiffs' name. The defendant has a perfect right to use the words "Hop Bitters," such words cannot now be used as trade marks (*Re Leonard* and *Ellis'* Trademark, 26 Ch. D. 288). There are numbers of companies manufacturing goods which they all call Hop Bitters.

HIS HONOR said: So far as I understand the case it is reduced to the question of whether the plaintiff company have their rights infringed by the defendant calling himself the "New York Hop Bitters Co." This title contains two lies, viz., that the goods are made in New York and are made by a company; but I am not to consider whether they are lies, but whether the adoption of those words are calculated to deceive persons or the public generally. I think in this respect the plaintiffs' case has totally failed. The only words common to both are "Hop Bitters," but the plaintiffs have not the exclusive ownership in those words. They

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are merely a description of the article, and amount to no more than that it is made from hops, and any person may say that. There is nothing in the case, so far as it stands at present, to induce me to grant an injunction against the use of the name. I think there was a similarity between the labels for the corks, but the defendant has ceased to use them. I refuse the application, but without costs, owing to the defendant's conduct in the matter.

DOUGLAS v. M'INTYRE. Oct. 14.

Insolvency Statute 1871 (*No.* 379), *sec.* 37, *sub-sec.* (*ii.*).

A creditor of an insolvent cannot bring a suit to set aside a transfer of property made by the insolvent on the ground that the transfer was made with intent to defeat and delay his creditors—The official assignee is the proper person to bring the suit.

This was a suit by the plaintiff, on behalf of himself and other creditors of one A. H. M'Intyre, an insolvent, seeking to set aside certain transfers of land at St. Kilda, as having been fraudulently made by the insolvent with intent to defeat and delay his creditors. The defendant is a brother of insolvent.

MR. TOPP appeared for the plaintiff; MR. R. WALSH and MR. LEWIS for the defendant.

HIS HONOR, in giving judgment, said: The bill in this suit states that Mr. Alex. Hamilton M'Intyre, before and after October, 1880, was in embarrassed circumstances, and unable to pay his debts, and then purchased land with his own money and had it conveyed to his wife Elizabeth Winter M'Intyre; that the grant of this land was mortgaged to a building society; that on March 21, 1882, the equity of redemption was assigned by Elizabeth Winter M'Intyre to the defendant, Peter M'Intyre, a brother of Alex. Hamilton M'Intyre, who obtained a certificate of title; that on September 11, 1882, another portion of this land was similarly mortgaged, and the equity of redemption was on November 21, 1882, similarly assigned to the defendant; that these transfers were really without consideration, and made for the purpose of delaying, hindering and defrauding the creditors of Alex. Hamilton M'Intyre, and the defendant was aware that Alex. Hamilton M'Intyre was in insolvent circumstances; that the purchase of the land in the name of Elizabeth Winter M'Intyre was made with the intent of hindering, delaying, and defrauding creditors of Alex. Hamilton M'Intyre, as both Elizabeth Winter M'Intyre and the defendant knew, and that by a secret agreement between Alex. Hamilton M'Intyre and the defendant, the latter holds in trust for the former; that Alex. Hamilton M'Intyre was at the time of the purchase indebted to divers persons for debts still unpaid; that on August 12, 1882, Alex. Hamilton M'Intyre was indebted to the plaintiff, Mr. Douglas, who issued a writ against him, and on December 6, 1882, obtained judgment; that he took similar proceedings for another debt, and recovered judgment on same day; that execution issued on these judgments, that the writs were returned unsatisfied, and on February 1, 1883, the estate of Alex. Hamilton M'Intyre was placed under sequestration in the hands of the defendant, Mr. Samuel Henry Cohen, as official assignee; that Cohen has been requested by the plaintiff, on his behalf, and on behalf of the other creditors of Alex. Hamilton M'Intyre, to take proceedings in this court to have the purchase and the transfers declared fraudulent and void as against the assignee and creditors, but he refused. The bill insists that the transfers are void, both under the provisions of the Act 13 Eliz. and the Insolvency Statute 1871, and prays that the land may be conveyed to Cohen as assignee. It purports to be on behalf of all creditors. It has been objected on behalf of the defendant that the plaintiff, a creditor, cannot sustain such a suit; that Cohen only can sue; and I have been referred to *Davis v. Snell* (28 Beav. 321), in which it is stated that in bankruptcy and insolvency the assignees are the only persons who can take proceedings in respect of the estate. In that case also the plaintiff had appealed to the official assignees in insolvency, who had refused. The decision did not proceed on the Act 7 and 8 Vict., 96, requiring that proceedings should be taken with consent of creditors. The reason given for the decision is that it would be extremely injurious to the general body of creditors if any one of them were to be at liberty to take on himself the functions of the assignee. To which I would add that it would be very unreasonable that persons against whom assignees may take proceedings should be subject to suits by each particular creditor, the result of which, if favorable to defendant, would not bind other creditors. It is similar to the case of rights of suit by creditors or legatees to enforce claims which the personal representative refuses to enforce. The same principle is found in *Heath v. Chadwick* (2 Phil. 649) to the same effect, although the bill alleged collusion between the assignee in insolvency and the defendants. *Goldsmith v. Russell* (5 De G. McN. and G. 547), recognised the same principle, but there a suit commenced before the insolvency was allowed to proceed. I should hold this objection especially strong where the impeachment of the conveyance is under the Insolvent Act. There is an old decision the other way—*Franklyn v. Fen*, Barnard 30—not noticed in modern books. This objection was not taken by demurrer for answer, and therefore I dismiss the bill without costs. It was said that Cohen would consent to be made co-plaintiff. Our rules did not allow a suit by a person not entitled to maintain it to be converted into one by him and another who was entitled. The Judicature Act may change this as to suits under it.

INSOLVENCY JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

Re POTTER. Oct 9.

Insolvency Statute 1871 (*No.* 379), *sec.* 56. *The*

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affidavit made in support of an application to have an official assignee appointed in the place of the original one who had resigned must be made by the solicitor of the applicant.

Application under sec. 56 of the Insolvency Statute for the appointment of an official assignee in the place of the original assignee who had resigned.

The affidavit in support of the application stated that a certificate had been granted to the applicant but had never been confirmed; that James Moore, the official assignee originally appointed, had resigned his office, and that no creditors had proved in the estate.

MR. WOOLF for the applicant: This application is made in accordance with your Honor's decision (*Re Sinclair*, 6 A. L. T., p. 79).

HIS HONOR said: The affidavit in support of the application is made by the managing clerk of the solicitor who has the conduct of the application. I will require an affidavit from the solicitor himself. I refuse the application on the ground that the managing clerk of a solicitor is not the proper person to make this affidavit.

Solicitor for applicant, *Woolf*.

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams and Mr. Justice Holroyd.)

THOMAS v. MARKS. Sept. 30.

Vendor and purchaser—Implied warranty—Where the goods sold are not of a specific description or where they are not "in esse," or are incapable of being inspected by the purchaser, an implied warranty arises that the goods are "merchantable"—Where there is an implied warranty that goods are merchantable, and the goods delivered are different to those bargained for, the purchaser has a right to keep and use such goods and either set up their inferior quality as an answer to an action brought for the price of them, or institute an action for any loss he has sustained by reason of their inferiority.

Appeal from County Court, Melbourne.

MR. ISAACS for the plaintiff (appellant); MR. HOOD for the defendant (respondent).

The plaintiff sued the defendant for £49 damages for breach of agreement to deliver to him a quantity of arsenic. The contract was "Melbourne, December 4, 1883. Bought of Edward Marks 10 tons of arsenic at £11 5s. per ton, at three months' acceptance for five tons delivered this month, and the other five tons in January. Casks, if returned within one month, to be allowed 25s. from date of delivery," &c. Five tons of arsenic were delivered to the plaintiff, but the plaintiff alleged that they were not of the same quality of arsenic as the defendant had agreed to sell, but of an inferior and unmerchantable quality, and the plaintiff claimed compensation. The evidence was to the effect that before the sale was made the defendant took the plaintiff's manager a sample. The plaintiff on examining the bulk found it mixed with brick and stones, iron, lead, and silver, and it was asserted in evidence that it was not marketable as arsenic. Commercial arsenic was worth £17 a ton. The plaintiff stated that the sample by which he purchased was a fine powder, whereas the bulk was in large lumps. The defendant told him prior to the sale that it was colonial. Plaintiff paid the price agreed upon. The plaintiff afterwards re-sold some of the stuff at a loss, and tried to re-sell the rest. The judge of the County Court nonsuited the plaintiff on the ground that although the article delivered might be arsenic, although not generally known in commerce as arsenic, yet the plaintiff should have rejected it when offered, but that having taken and used a portion, he could not refuse to pay the full contract price agreed upon.

MR. JUSTICE HIGINBOTHAM said that the learned judge of the County Court had found as a fact that the arsenic as delivered was not arsenic in the commercial sense; that it was not what was bargained for, and he proceeded to state that the plaintiff should have rejected it when it was offered to him, and that as he had used a portion of it he could not refuse to pay the contract price agreed upon. There was no doubt that if a person got something different to what he bargained for when there was an implied warranty that the article was merchantable he had a right to keep it and use it, and either set up its inferior quality as an answer to an action brought for the price of it, or institute an action for any loss he sustained by its inferiority. But it was submitted that on the facts in this case there was not a warranty implied. He thought that the contract of December 4, 1883, primarily and clearly referred to an article not *in esse*, and an article not necessarily capable of being inspected by the purchaser. And where the article sold was not of a specific description, or where it was not *in esse*, or where it was not capable of being inspected by the purchaser, there was always an implied warranty that the goods were merchantable. There was some evidence here that the arsenic delivered was not sound, and was not of merchantable quality, and the plaintiff was therefore entitled to a verdict. The appeal would be allowed, and the case be re-heard before a judge of the Supreme Court.

MR. JUSTICE WILLIAMS concurred. If it was shown that the goods sold were not specific goods, or that they were not *in esse*, or that the buyer had no reasonable opportunity of inspecting them, then an implied warranty at once arose that they were merchantable. The onus was on the plaintiff to show those facts. Here he had given some evidence of these facts. Yet the judge held that the plaintiff could not retain the goods and sue for the difference in price. That was clearly not the

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law, and the plaintiff was entitled to have the damages ascertained for what he had lost through the goods not being in accordance with the implied warranty.

MR. JUSTICE HOLROYD concurred.

Appeal allowed, with costs. Re-hearing ordered. Each party to pay his own costs of the trial in the County Court.

CARSON v. WOOD. Oct. 1.

Landlord and tenant—Ejectment—Where a lease contains a covenant that the lease shall be forfeited if the tenant sublets the premises, and the landlord knowing that the tenant has sublet signs the lease, held, *that the signing indicated an intention on the part of the landlord to waive his right of forfeiture.*

Rule *nisi* to enter a verdict for the plaintiff.

MR. WEBB, Q.C., and MR. BRYANT moved the rule absolute; MR. A'BECKETT and MR. HODGES showed cause.

This was an action of ejectment, brought to recover possession of premises in Little Collins-street. The defendant had leased the premises from the plaintiff, and in the lease there was a covenant against the defendant subletting, and there was a provision that in the event of the defendant subletting the lease should be forfeited. It was alleged that the defendant had sublet, and had thereby forfeited the lease. The defence was that the plaintiff had waived the forfeiture. It appeared that in December, 1883, the plaintiff agreed to lease the premises to the defendant. The lease, however, was not signed till the 6th May, and it was dated as from the 12th March. Between March and May the defendant had sublet portions of the premises. It was stated that the plaintiff had notice of this subletting before he signed the lease in May, and therefore he had waived his right to enforce forfeiture for breach of the covenant not to sublet. It was contended for the plaintiff that even if he had knowledge of the subletting he might sign the lease so as to enforce his right to insist on a forfeiture of it. The jury gave a verdict for the defendant, but leave was reserved to the plaintiff to set this aside and enter a verdict for him.

MR. JUSTICE HIGINBOTHAM said that the finding of the jury determined this case. The jury were asked did the plaintiff know that the premises had been sublet in the way described when he executed the lease. The jury found that he did know on the 6th May, when he signed the lease, that defendant had previously sublet the premises. The landlord, in signing the lease with that knowledge, indicated an intention to waive his right to forfeit it.

Rule to enter a verdict for plaintiff discharged.

ROTHERY v. PATTERSON. Sept. 30.

Land Act 1869 *(No.* 360*), sec.* 94*—Local Government Act* 1874 *(No.* 506*), sec.* 386*—Sec.* 386 *of Act No.* 506 *does not empower municipal councils to authorise persons to enter upon any Crown lands for the purpose of removing stones, &c., but only from lands specially reserved for that purpose.*

Special case stated by justices. The defendant was summoned for removing stone from Crown lands without a licence. The summons was under section 94 of the Land Act 1869, which provides that "if any person not licensed or otherwise authorised under this act . . . . cut, dig, or take from any Crown lands any live or dead timber, gravel, stone, limestone," &c., he shall be liable to a fine not exceeding £10. The defendant justified his taking the stone on the ground that he was authorised to do so by the surveyor of the St. Arnaud Shire Council. This authority was given under sec. 387 of the Local Government Act 1874, which provides that the council of every municipality by their surveyor or any person authorised by them in writing may enter and search for, dig, raise, gather, take, and carry away, on and from any land within, or with the consent of the Board of Land and Works, without, the municipal district . . . . . and in and from any Crown lands specially set apart for the purpose by the Minister, any materials necessary for making or maintaining any matter or thing which the council are by this part of this Act authorised to make or maintain," &c. The justices held, on the authority of *Bell v. Wade*, 9 V. L. R. 5 (L), that the authority from the municipal surveyor sanctioned the defendant's removing the stone from the Crown lands. It was admitted that the stone was taken from Crown lands that had not been specially set apart for the purpose by the Minister. The justices dismissed the case, and the complainant appealed.

MR. BOX, for the complainant, submitted that the decision in *Bell v. Wade* was erroneous, and that no stone could be taken from any Crown lands except under licence, or except from the lands specially set apart for the purpose by the Minister.

There was no appearance for the respondent.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said that this was a case stated by the justices at St. Arnaud for the opinion of the Court. There was an information against the defendant under the 94th section of the Land Act 1869 for removing stone from Crown lands without having a licence. The defendant justified the removal of the stone on the ground that he was authorised by the shire surveyor to enter on the Crown lands and remove the stone for the purpose of making a road. This justification was under section 386 of the Local Government Act 1874, which provided that the council of every municipality, by their surveyor, or any person authorised by them in writing, may enter, search for, dig, take and carry away, on and from any land

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within, or with the consent of the Board of Land and Works without, the municipal district, not being land excepted in the last section (namely the site of a house, or curtilage of a house, or a garden, lawn, yard, &c.), and in and from any river, creek, or watercourse, and in and from any Crown lands specially set apart for the purpose by the Minister, any materials necessary for making or maintaining any matter or thing which the council are by this part of the Act authorised to make or maintain. The justices dismissed the complaint, and the complainant appealed. Reference had been made to *Bell v. Wade* (9 V. L. R.), decided in March, 1883, in which it was apparently decided that any person authorised by a municipal council could enter upon Crown lands to remove stone, &c. There was possibly a distinction to be drawn between that case and the present, for here the authority was not given by the council in writing, but the Court was of opinion that *Bell v. Wade* had been decided without sufficient consideration, and that section 386 of the Local Government Act did not permit the municipal councils to authorise persons to enter upon any Crown lands. In a previous case, *The Ballarat Council v. The Bungaree Road Board* (1 A. J. R. 49), it was held that the words "any lands" in a corresponding section of the Act 27 Vict., No. 176, did not apply to Crown lands, and in consequence of that decision in the Local Government Act of 1874 the clause was introduced enabling the councils to authorise the removal of stone, &c., from land specially reserved by the Minister. The protection against the interference with Crown lands was necessary, for otherwise any of the municipalities might enter upon any of the public reserves. The defendant in this case had no authority to remove the materials, and the decision of the justices dismissing the case against him was therefore wrong. The appeal would be allowed, and the case remitted to the justices with this opinion of the Court. As the justices probably based their decision on the case of *Bell v. Wade*, no costs would be allowed.

Appeal allowed without costs. Case remitted to the justices for rehearing.

Oct. 3.

THE GARIBALDI CO. v. THE CRAVEN'S NEW CHUM CO.

Local Government Act 1874 (*No.* 506), *sec.* 370—*Land Act* 1869 (*No.* 360), *sec.* 69—*Mining Statute* 1865 (*No.* 291), *sec.* 16. *Property in the soil in a public street, road or highway cannot be created by virtue merely of a grant by the Crown of land adjoining such street, &c.*

This was a summons referred by Mr. Justice Higinbotham to the Full Court. The plaintiffs sought for an injunction to restrain the defendants from mining under a portion of Rose-street, Sandhurst, which the plaintiffs claimed belonged to them.

MR. HELM and MR. HODGES for the plaintiffs; MR. WEBB, Q.C., and DR. MADDEN for the defendants.

MR. JUSTICE HIGINBOTHAM said,—This is a summons referred by a judge to the Full Court, and, in accordance with the Judicature Act, it is now to be dealt with finally by the Full Court. This is an application for an injunction to restrain the defendants from continuing to mine upon a certain portion of Rose-street, in the city of Sandhurst, adjoining and abutting on the plaintiff's land. The Crown grant of the plaintiff's land bears date October 10, 1876, and the land is thus described in the Crown grant:—"All that piece of land in the said colony, containing 34 perches, more or less, being Allotment 21 of Section 21B in the city of Sandhurst, parish of Sandhurst, county of Bendigo, delineated with the admeasurements and abuttals thereof in the map drawn on the margin of these presents and colored yellow." The plaintiffs rest their claim for an injunction solely upon the authority of the case of *Davis v. The Queen* (6 W. W. & A. B.). I therefore feel myself called upon to examine that authority. That case decides that it is a presumption of law equally applicable to a grant from the Crown to a subject in Victoria as to a grant between subject and subject in Great Britain; that the grant of land bounded by a highway carries the fee of the highway to the centre of it—a presumption which is based upon the supposed unreasonableness of the grantor retaining that which is assumed to be of no use to him, but which may prove of service to the grantee. That decision was overruled, and the alleged presumption was declared to be rebutted in the case of land at any time reserved or proclaimed under any land Act as a road, street, or highway by the Local Government Act 1874, section 370. That section expressly declares and enacts that notwithstanding any presumption of law to the contrary, the absolute property in the land so reserved or proclaimed before or after the commencement of the act shall be vested in the Crown. This declaratory enactment includes and applies to a large number of roads, streets, and highways in shires and boroughs. The plaintiffs must establish their title to the land in respect of which they claim the injunction against the defendants, and they were bound, in my opinion, to show that the presumption on which alone they relied, applies to their land by proof that the road was not a reserved or proclaimed road, street or way under any land act. And as the Court is now called upon by the plaintiff to review the decision in *Davis v. The Queen*, I feel myself required to state that the principle of presumption adopted and applied in that case is one which, in my opinion, ought not to have been adopted by the Court, and cannot properly be applied to roads vested in the Crown and held by it in this country as trustee for the benefit and use of the public. The presumption is itself founded upon a fiction, which is not only not true,

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but which is the reverse of the truth—namely, that the roads are of no use to the Crown as grantor, but that they may be of use to the owner of the adjoining land as grantee. The fact is that the public roads, streets and highways are of the highest value and utility to the public, who are the real and true owners of them, and they cannot lawfully be used for any other purpose whatever by the adjoining owners, except for the purpose of passage, which is common to these owners and to every member of the community. But if the alleged presumption of law were applicable to any case, it is, I think, clear upon the authorities that it would be applicable only to cases where the original grant is lost, or where the terms of description are general, and that the presumption is rebutted in all cases like the present, where the two principles of construction applied to the existing form of the grant show that it is intended that no part of the soil of the road shall pass to the purchaser of the adjoining land. This grant describes with exactness the boundaries and area of the land granted. Upon this point I adopt the language of Mr. Justice Stephen in *Carvalho v. The Black Hill Co.* (1 V. L. R. 236)—"When you have merely to see the deed the grantor meant to convey, and when you have as clear a mathematical description of the parcels as you have of a figure in a proposition in Euclid I can only draw the conclusion that the grant was not intended to pass anything beyond the land shown by the colouring and the number of chains and links in the plan." Additional, and, in my opinion, most weighty reasons for believing that the Legislature has never contemplated the alienation from the Crown in Victoria of the highways or roads, or the acquisition of rights of property therein by adjacent owners, are to be found in the Land Act 1869, section 96; the Local Government Act 1874, and the Mining Statute 1865, sec. 16. And while it is the duty of the Court and of every member of it to uphold and give effect to all decisions of the Court so long as they are adhered to by the Court, and are not overruled by a court of appeal, I conceive it to be also the duty of the Court, when it is fully satisfied that its previous decision is erroneous, to announce, when the occasion calls for it, a change in its views. I am clearly of opinion that the property in the soil in a public street, road, or highway in Victoria cannot be and never has been created by virtue merely of a grant by the Crown of land adjoining such road, street, or highway. I feel myself called upon, under the circumstances of this case, to state that I think the decision in *Davis v. The Queen* is one which cannot be sustained, and ought not any longer to be regarded as law. I base my judgment on this ground in refusing the injunction applied for by the plaintiffs—that the plaintiffs have proved no title to the half of the street. But I also think that the injunction must be refused on another ground. The grant to them of the land abutting on Rose-street contains certain exceptions and reservations. One reservation was as follows:—"Excepting, however, unto us, our heirs and successors, all gold and silver and their ores and all auriferous earth and stone in the said land, and also excepting and reserving unto us, our heirs and successors, assigns and licensees, and our and their agents and servants, without giving any compensation except for damage, if any done, to the surface of the said land, the amount thereof to be settled and ascertained by the Board of Land and Works of the said colony, full liberty and authority at any time or times hereafter to enter into and upon the said land, and to search and mine therein for gold and silver and the ores thereof, and to dig, win, and carry away, extract and remove therefrom any gold, silver and the ores thereof, and any auriferous earth and stone, and for the purpose aforesaid to do anything which may be necessary or usual in mining, and with all other incidents that are necessary to be used for the getting of the said gold and silver and their ores, and any such auriferous earth and stone, and also subject to resumption under the 99th section of the Land Act 1869, under the provisions of which act the said piece of land has been alienated." The affidavits relied upon for the plaintiffs do not clearly establish that any earth not auriferous earth and stone had been taken by the defendants, or that the land has been disturbed except by the removal of this auriferous earth. It is quite consistent with the affidavits that the defendants have removed only earth which by the terms of the exception were excepted from the grant to the plaintiffs. It matters not, in my opinion, whether the defendants are or are not authorised by the terms of their mining lease to take what they have taken. It may be that they are trespassers as against the Crown, but as they have not taken any property of the plaintiffs an injunction cannot be granted against them.

Mr. Justice Williams said: I concur in the judgment which has just been delivered. I am of opinion that the case of *Davis v. The Queen* was wrongly decided. The doctrine of *ad medium filum viæ* is one that is founded in the mother country on the presumption that the ownership in the soil of the road belongs to the owners of the adjoining lands on either side. That presumption has arisen in England from the fact of the ancient history of the roads—of the antiquity of the roads. This was a presumption of convenience on account of the impossibility in a great many cases, and the difficulty in others, of going back through a series of centuries to ascertain the title to the soil of the road, or in many cases the title to the adjoining lands. That this presumption had arisen in this way is clearly shown by the case of *Beck v. The Corporation of Leeds* (L. R. 7 Ch. App.) That shows that it is a mere presumption, and that it is rebuttable by very slight evidence tending to show that the ownership of the soil or road is in some-

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one else. By that decision it is shown that it is a mere presumption, that it may be rebutted by showing that the ownership of the soil of the road is in someone else, and that it has arisen from the antiquity of the roads. That reason does not apply to the roads in this country. We know that the soil of the roads in Victoria is vested in the Crown, so that the reason for the presumption does not exist here. The Acts of Parliament to which reference has been made rebut the presumption, and show that the Crown has the right to the soil, and can dispose of that as it pleases. By the Local Government Act the control and management of the roads is placed in the municipalities and shires. But the Crown never parted with the soil. Section 96 of the Land Act 1869, which provides that "where a road adjoins any purchased land and is required for access to such lands only, and not otherwise for public use and convenience, if the owner of such land make application to close such road and the board approve thereof, and if an adequate money consideration according to the determination of an appraiser appointed by the said board be paid for the same, the board may order such road to be closed, and the Governor may grant in fee the soil of the road so closed to the owner of such adjoining land." That shows not only that the presumption did not exist, but if it did exist that it was at once rebutted. It also seems to me to be opposed to English authority. From the decision in *The Plumpstead Board of Works v. the British Land Co.* (L. R. 10 Q. B. 16), it appears that where there is a Crown grant such as was issued in this case or a title deed in the same form as this Crown grant, instead of there being a presumption that the road belonged to the owners of the adjoining lands, no such presumption did arise. The presumption was rebutted by the form of the grant or deed. In that case it was held that where land is defined as being bounded by a distinctly marked road, no part of the road was contained in the conveyance to the purchaser. I therefore think that the decision in *Davis v. the Queen* was wrong, and I concur in thinking it should be overruled. If we are clearly of opinion that *Davis v. the Queen* is wrong in law, I concur in thinking it should be overruled. If we are clearly of opinion that *Davis v. the Queen* is wrong in law, it is our duty to say so, in order that the public, who might otherwise act as if *Davis v. the Queen* was law, should not for one moment longer than can be helped remain under a wrong impression. It may seriously affect conveyances of land, and, therefore, I think it should be known as early as possible that we think *Davis v. the Qveen* to be wrong. I therefore think the summons should be dismissed.

MR. JUSTICE HOLROYD said :—I think the decision in *Davis v. the Queen* was wrong, but I am not prepared to overrule a decision of the court without hearing arguments upon it. In this case Mr. Helm rested his case entirely on *Davis v. the Queen*, but he declined to argue in support of that decision—that it was for the other side to impeach it. Mr. Webb, on the other hand, said he considered *Davis v. the Queen* impeachable, but his case was otherwise so strong that he did not care to undertake a discussion of the question. I do not know what might be said for or against that decision, and I prefer to rest my judgment on an entirely different ground, namely, that it is not a case in which an injunction against a trespass can possibly be granted. The plaintiff company has applied for an injunction to restrain the defendants from continuing to mine on its land, or taking gold from it. Substantially, the injunction asked for was to restrain mining on land claimed by the plaintiff. The Crown grant, from which the title of the plaintiff company is derived, contains an exception and reservation of all the gold and silver ore, and all auriferous stone and earth. But it appeared that although the defendant company was mining on plaintiff's land, inasmuch as the plaintiff's land overlies the working and may surround it in other places, nevertheless the actual workings of the defendant company are entirely in the auriferous stone and earth, and, consequently, the defendant company had not been mining on the plaintiff company's land, and as far as appears from the affidavits that is admitted to be so. I will suppose that in taking this auriferous soil and earth some of the soil of the plaintiff company had been trespassed upon. Certainly that trespass was not, according to the evidence, intentional, and even on that supposition, therefore, an injunction would not be granted to restrain the trespass. Injunctions have been granted in equity to restrain a trespass, although the plaintiff had no right to the gold. But here it was admitted that the defendant company had taken out something to which it had an apparent right, at all events, to which it had a colorable title. The plaintiff, however, had no title to it, and the only claim for an injunction is that injury was accidentally done in the defendant taking that which it had a right to take. I think the injunction should be refused.

Summons for injunction dismissed with costs.

(Before their Honors Mr. Justice Molesworth, Mr. Justice Higinbotham, and Mr. Justice Holroyd.)

REG. v. O'BRIEN. Oct. 3.

Trial for murder—Evidence—Misdirection—Threat used against a class are evidence against a prisoner charged with the murder of one of that class—The castes taken of tracks said to be the prisoner's and of tracks made by the boots the prisoner was wearing at the time of his arrest are evidence—It is not a misdirection for the judge to tell the jury that they might take into consideration the fact that it was not suggested that any one except the prisoner

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entertained any ill-feeling to the deceased or had any motive or inducement to commit the crime.

Special case reserved on the trial of William O'Brien for the murder of Peter M'Ainch. The trial was heard before Mr. Justice Williams. The prisoner was found guilty and sentenced to death, but execution was respited until after the determination of the special case stated on several points reserved during the trial. The case stated that during the trial, Sir Bryan O'Loghlen, who appeared for the prisoner, objected to portions of the evidence adduced for the Crown:— "(1.) All evidence relating to what was done in reference to a certain 40-acre allotment of land, or relating to any threats or statements made by the prisoner in reference to that land. (2.) To all evidence relating to the comparison made by witnesses of impressions made on and in the ground by means of the prisoner's boots with what were supposed to be original tracks made by the prisoner when wearing the same boots. (3.) To the reception in evidence of casts made from the so-called original tracks. Counsel for the prisoner also complained of my charge to the jury as being erroneous in point of law, in this respect, that I told the jury that in considering the case, assuming them to be of opinion that the prisoner had a motive for committing the crime with which he was charged, they might take into consideration that it was not suggested that any one else entertained any ill-feeling to the deceased, or had any motive for or inducement to commit the crime. The deceased was killed on the 24th of July of the present year by a gunshot wound." The case then set out the evidence of several witnesses to the effect that the prisoner had owned two lots, one of 40 acres, the other of 20 acres. He gave security to the Commercial Bank over both allotments, and not being able to pay his debt the bank obtained the title to both lots. The 40-acre lot was sold afterwards to Mr. H. L. Galbraith, a farmer, the 20-acre lot was in 1881 leased by the bank to M'Ainch; O'Brien had a hut on the land; the bank ejected him from the hut, and burnt it down. Evidence was given by several witnesses to the effect that the prisoner had said he would shoot any man who took the land. Some of the evidence related to statements he had made five years ago before M'Ainch obtained possession of the land. He had also made use of threats generally as to persons who should purchase the 40-acre allotment. The admission of this evidence was objected to on the ground that the threats were general, and were not pointed particularly at M'Ainch, and were made some time before the death.

Sir Bryan O'Loghlen appeared for the prisoner; Mr. Chomley for the Crown.

Sir Bryan O'Loghlen contended that general statements made by the prisoner as to what he would do to purchasers of any land, not that which M'Ainch had purchased, were inadmissible. The evidence should be relevant to the particular charge against the prisoner, and should be confined to the relations between him and the deceased. The other evidence that had been received as to his general threats about the land amounted only to evidence as to his disposition, and was no evidence as to his having committed this particular murder. It was clearly proved that this was not a suicide, but that the deceased had been murdered by some one. The difficulty was to connect that murder with the prisoner, and the evidence against him consisted for the most part of tracks, of a gun found in the prisoner's hut, and of the general threats. He submitted that those threats were no evidence at all, unless to show the disposition of the accused, to show his previous history, and as such they were not admissible in evidence by the English law. He made statements which were not uttered against any particular individual, which did not show any particular animosity against any individual, nor relating to the occupant of this particular land, but they merely tended to show an evil disposition on the part of the accused. The next objection to the reception of the evidence was, that testimony had been received of the comparison of tracks, one of which was said to have been made by the prisoner, and the other was impressions made by boots of his. From both impressions casts were taken, and these casts were received in evidence. The case stated that "the effect of the evidence adduced at the trial, so far as it related to the objection numbered 2, was that certain, for the most part, continuous tracks of a man's feet were found leading from near to a hut in which prisoner lived to the scene of the murder, and back again from the scene of the murder to the neighborhood of the hut; that these tracks were fresh tracks; and that the police, having arrested the prisoner the day after the murder, and obtained possession of the boots which he was wearing, brought these boots on to the newly-ploughed land where the tracks were, and, instead of fitting the boots into the tracks found, made impressions with the boots on the newly-ploughed ground alongside the tracks found, and then compared the tracks which had been found with the impressions so made, and found them to correspond in every particular. It was the evidence of the witnesses as to the result of this comparison that was objected to by counsel for the prisoner. The soil in which the impressions were made was loose and friable soil, and was newly ploughed. The effect of the evidence adduced at the trial, so far as it relates to the objection numbered 3, was that certain plaster of Paris casts were proved to have been made from the tracks above stated to have been found on the ground. Prisoner's boots were produced and put in evidence, and these casts were tendered in evidence objected to, and I received them." It was submitted that the tracks should not have been compared by impressions being

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placed alongside them from the prisoner's boots, but that the witnesses should have measured the tracks, and stated to the jury what they had seen. It was also submitted that the casts were not evidence, and that if the impressions were to be given in evidence it should be the original impressions, and not copies. As regarded the last objection, namely, misdirection, the case stated that no suggestion was made at the trial, either in the cross-examination of the witnesses for the Crown, of whom a large number were called from the neighborhood where the deceased and the prisoner lived, that anyone else had any ill-feeling, or had expressed any ill-feeling against the deceased, or had any motive for the crime, nor was any such suggestion made by counsel for the prisoner in the course of his address to the jury. He submitted that it was not for the prisoner or his counsel to suggest that any other individual committed the crime, or had any motive to commit it. The onus of proof that the prisoner committed the offence rested with the Crown. It was not for the prisoner to prove that anyone else might have committed it.

Mr. Chomley said that the evidence as to threats was admissable. The prisoner threatened to shoot anyone who took the ground that he had owned. The deceased did take the ground that prisoner had owned and was shot. As regarded the statement to the jury that there was no suggestion that anyone else had any ill-feeling against the deceased, that was not given as a direction, but was merely a suggestion in the course of discussing the question with the jury. If the judge had not mentioned it, the jury themselves would probably have considered it. It was shown for the Crown that the prisoner had motives of hostility against M'Ainch, but the effect of that evidence would have been much weakened if it had been shown that other persons had ill-feeling against M'Ainch. But that had not been done. As regarded the evidence as to the impressions of the boots and the casts, he submitted that the course pursued by the Crown was the only one that could have been taken, that it was much better to make impressions from the boots alongside the tracks, and then compare them with the tracks. It was impossible to bring the earth into the Court, and the casts were the next best evidence.

Mr. Justice Molesworth said that several objections had been taken to the admission of evidence with reference to two allotments of land, one of 40 acres and one of 20 acres, the latter of which was purchased by M'Ainch. Both allotments were connected in their history. Both had belonged to the prisoner, and both passed into the possession of the bank, which issued execution against them and sold them. The 40-acre lot seemed to have been transferred about five years ago. The 20-acre lot had a different history. It got into the hands of M'Ainch, who first leased it, and ultimately his wife purchased it from the bank. He and his wife built a house on it shortly before the occurrence which formed the subject of the trial. The evidence against the prisoner was that he had expressed a strong resentment against the conduct of the bank in dispossessing him, and he expressed a feeling of revenge against any person who should endeavour to obtain an interest in the land of which, according to his view, he had been improperly deprived. The evidence did not indicate animosity against a particular person, but a declaration of intention to commit a particular class of crime. There was a continuous threat against anybody who would interfere with any portion of his land, including both the lots. The declarations were admissable as regards both parcels, as showing that he had feelings of animosity against any one who had not directly injured him, but who indirectly injured him by taking possession of the land. The other evidence was also evidence. The casts were taken to fortify the opinion of the witnesses as to the identity of the tracks with the impression made by the prisoner's boots. As to the objection to the charge of the learned judge, the jury in a case of this kind might fairly consider whether any other person could have committed the offence, and whether any other person had a motive against the deceased If it was shown that any other person had a motive of revenge against the deceased, it would lessen the effect of the evidence against the prisoner. It was open to the prisoner or his advisers to make inquiries if any other person had any ill-feeling against the deceased. If the learned judge had said nothing about it, the jury themselves might have asked who else could have done it. It was possible for the jury to fall into a misapprehension as to the law of evidence, but if it was supposed that they misapprehended what was said to them, a request should have been made that the jury should be recalled, and the misapprehension removed.

Mr. Justice Higinbotham and Mr. Justice Holroyd concurred.

Conviction affirmed.

IN CHAMBERS.

(Before Mr. Justice Higinbotham.)

Nicholson v. Roff. Oct. 23.

Rules of Supreme Court 1884, *Order L., rule* 6—*Injunction—Undertaking as to damages—Form of undertaking.*

Application for an injunction under Order L., r. 6.

Mr. Hood, for the plaintiff: The action is brought to recover damages for trespass. The defendant was tenant to the Freehold Banking Co. of a piece of land in Flinders-street, on which there was erected a large hoarding. The tenancy came to an end, and the place was let to the plaintiff, who posted bills on the hoarding. The defendant is in the habit of pulling the plaintiff's bills down in the night, and placing his own on the hoarding. The

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plaintiff now seeks an injunction restraining the defendant from interfering with the hoarding.

MR. FORLONGE, for the defendant: The hoarding belongs to the defendant. The defendant erected it on the land with the distinct understanding from the bank that he should be allowed to take it down at the expiration of the tenancy. If an injunction is granted the plaintiff should give an undertaking as to damages (*Graham v. Campbell*, 7 Ch. D. 490).

HIS HONOR said: The plaintiff can take an order for an injunction to restrain the defendant from entering the land in dispute. The plaintiff must give the undertaking as to damages, which I find is usual in applications for an injunction of this nature.

MR. HOOD consented to give the undertaking.

HIS HONOR continued: I will grant the order for an injunction. The undertaking as to damages to be in the following form:—The plaintiff by his counsel undertakes to abide by any order the Court may make as to damages in case the Court should hereinafter be of opinion that the defendant shall have sustained any by reason of this order which plaintiff ought to pay. Costs to be costs in the cause. I certify for counsel.

Solicitors: For plaintiff, *Dixon*; for defendant, *Lowe*.

(Before Mr. Justice Higinbotham.

GREEN V. EMBLING. Oct. 25.

Rules of Supreme Court 1884, *Order XXXVI.*, *r.* 6.—*On an application to have an action tried with a jury a judge will not require an affidavit as to the nature of the action if the pleadings are produced—If the pleadings are not produced an affidavit is necessary.*

Application under Order XXXVI., r. 6, that the action be tried with a jury.

HIS HONOR said: In applications for a trial with a jury the pleadings ought to be produced to enable the judge to determine whether the action is a fit one to be tried with a jury or not. If the pleadings are not produced an affidavit ought to be filed stating the nature of the action.

Solicitor for applicant, *M. H. Davies*.

[See *Pralle v. Slater*, ante p. 70; and *Coulson v. Campbell*, ante p. 89.—ED. *A. L. T.*]

(Before His Honor Mr. Justice Williams.)

HOLT V. HENRY. Oct. 31.

Interrogatories — Nature of interrogatories—On application an for leave to deliver interrogatories the nature of the proposed interrogatories should be stated — Where the pleadings are produced a statement from counsel of the nature of the proposed interrogatories will be sufficient.

Application under Order XXX., rr. 1 and 2, on behalf of the plaintiff.

MR. TOPP, for the plaintiff: This is a general summons for directions. The plaintiff now seeks discovery on oath of the documents which are or have been in the defendant's possession or power relating to the matters in question in this action; and for leave to deliver interrogatories in writing for the examination of the defendant.

MR. ISAACS, for the defendant, objected to leave being given to deliver interrogatories, as the nature of the interrogatories was not stated (*Hall v. Liardet*, W. N., Nov. 10, 1883, pp. 165 and 175).

HIS HONOR, after ascertaining from Mr. Topp the nature of the interrogatories sought to be delivered, said: In all cases where leave is sought to deliver interrogatories, if the pleadings are before me I shall be satisfied with a statement from counsel of the nature of the interrogatories, and shall not require their nature to be otherwise set out. I make the order as to so much of the summons as relates to the discovery and the interrogatories, costs to be costs in the cause. I certify for counsel. The rest of the summons to stand over.

Solicitors: For plaintiff, *M. H. Davies*; for defendant, *Emerson* and *Barrow*.

Nov. 1.

STEVENS V. MAYOR, &C., OF FLEMINGTON AND KENSINGTON.

County Court Statute 1869 (*No.* 345), *sec.* 43—*Application for remission of action to County Court made* ex parte.

Application on behalf of the defendants, under sec. 43 of the County Court Statute 1869, to remit the action to the County Court, on the ground that the plaintiff is an uncertificated insolvent.

There was no appearance for the plaintiff.

HIS HONOR said: I am inclined to think that applications of this nature should be made *ex parte*. I order that the action be remitted to the County Court unless the plaintiff within seven days give security for the defendants' costs or satisfy a judge that he has a cause of action fit to be prosecuted in the Supreme Court.

Solicitors for defendants, *Gillott* and *Snowden*.

[See *Tilley v. Hoyt*, 6 *A. L. T.* 67.—ED. *A. L. T.*]

(Before His Honor Mr. Justice Holroyd.)

NIXON V. MILTON AND OTHERS. Nov. 6.

County Court Statute 1869 (*No.* 345), *sec.* 42—*Interrogatories—Where the plaintiff's sole objection to have the action remitted is that he wishes to deliver interrogatories to the defendant the judge will adjourn the summons to enable him to do so.*

Application under sec. 42 of the County Court Statute on behalf of the defendants that the action be remitted to the County Court.

MR. BROWN, for the defendants: The action is one on a contract, and the sum sought to be recovered is under £250.

MR. BRAHAM, for the plaintiff: A prospectus was issued in the name of the defendants inviting the

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public to subscribe in an intended mining company. The plaintiff did subscribe, but the venture proved abortive and the action is brought to recover the amount of the plaintiff's subscription. The plaintiff seeks to deliver interrogatories to the defendants to ascertain whether they issued the prospectus. This can only be done in the Supreme Court (*Smith v. Hurley*, W. N., April 12, 1884).

His Honor said: I think it seems reasonable that interrogatories should be administered in this case. I will adjourn this summons for the purpose of giving the plaintiff time to administer the interrogatories. If the plaintiff does not apply within a reasonable time for leave to deliver the interrogatories this application can be renewed.

Solicitors: For the plaintiff, *Braham* and *Pirani*; for the defendants, *Brown*.

Stevens v. Mayor, &c., of Flemington and Kensington. Nov. 6.

County Court Statute 1869 *(No.* 345*), sec.* 43—*Corporation—Affidavit—A corporation can apply under sec.* 43 *to have action remitted—Who may make the necessary affidavit.*

Application under sec. 43 of the County Court Statute that the action be remitted to the County Court, on the ground that the plaintiff has no visible means of paying the defendant's costs if unsuccessful.

Mr. Isaacs, for the plaintiff: A corporation cannot make an application of this kind, and if it can it must be done by a properly authorised agent. (*Re Lecky*, 3 W. W. & A'B. 42 (I.)). The town clerk has made the affidavit; he is not an agent for litigious proceedings. The defendants in their notice of appearance required a statement of claim, but have not put in a statement of defence, and the time for putting such defence in has elapsed. The main object for commencing an action of this sort in the Supreme Court is to find out what the defence really is. The defendants, by our statement of claim, have discovered the plaintiff's whole case, and now, by applying to have the case remitted, seek to deprive the plaintiff of all chance of finding out what their defence may be.

Mr. Hodges, for the defendants: The town clerk is the individual who represents the corporation The writ is served on him. Any person who can give the information is the proper person to make the affidavit.

His Honor said: I think that it was intended that when the plaintiff, if unsuccessful, has no means of paying the defendants' costs, although the defendants may be a corporation, that the defendants should be at liberty to apply to have the case remitted, unless the plaintiff give security or satisfy the judge that the action is a fit one to be tried in the Supreme Court. The word person properly excludes corporation, both by its legal meaning and by the provisions of our Statute. I cannot see any reason why a corporation should be deprived of this right. Since a corporation cannot make an affidavit it must be made by someone else. If the town clerk can speak to the facts I think he is the very best person to make the affidavit. In many respects it is provided that he is the person to transact the business of the corporation. I do not, however, think it necessary that it should be made by him. I think I ought to make the order, but I will make it in such a way as to give time for a statement of defence to be put in. As nine days were allowed to elapse before the summons in this application was taken out, I order that the defendants have five days within which to put in a statement of defence, and that after the defence has been delivered the action be remitted to the County Court.

Solicitors: For plaintiff, *Best*; for defendants, *Gillott* and *Snowden*.

Sittings in Banco.

(Before their Honors Mr. Justice Williams and Mr. Justice Holroyd.)

The Queen v. Trenowith. Oct. 4.

Judicature Act 1874 *(No.* 502*), secs.* 2, 22—*Criminal information for libel—Where a criminal information is brought by the Prothonotary it must be tried "at bar," unless the Attorney-General has granted his warrant of* "nisi prius"—*Such informations, though "penal" in consequences, are deemed "civil" in the matter of procedure.*

The prosecutor had obtained leave to file a criminal information for libel against the defendant. The libel contained attacks on several persons employed at the boot factory of Messrs. W. Lang and Co., Fitzroy, including the plaintiff, in which they were referred to as "scabs." The trial took place at the *Nisi Prius* sittings, before Mr. Justice Williams and a special jury of 12, when the defendant was found guilty. A special case was reserved for the consideration of the Court on several points raised during the trial, and a rule *nisi* was also obtained to set aside the verdict on the grounds that the Court had no jurisdiction to try the case, as there was no warrant from the Attorney-General authorising the trial; that the trial should have been had before a common jury; that the prosecution had no right to order jurors to stand aside, and that there was no evidence of publication by the defendant.

Sir Bryan O'Loghlen appeared for the prosecution; Mr. Purves and Mr. Mitchell for the defendant.

Mr. Justice Williams, in giving the judgment of the Court, said that a special case had been reserved at the trial under the Criminal Law Procedure Statute, and there was also a rule *nisi*. The information was under the 22nd section of the Judicature Act 1874, which directed that information shall be filed in the name of the prothonotary of the Supreme Court. Some difficulty had arisen as to whether the proceedings were civil or criminal in

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their nature. There was no doubt that the consequences were penal, but the Court thought the proceedings were civil as a matter of procedure. They would, therefore, deal with the case not on the special case reserved, but on the rule *nisi*. The points in the rule *nisi* were the same as those in the special case, and they had all been satisfactorily answered by Sir Bryan O'Loghlen during the argument except one. That one was that the form of trial was irregular, that there should have been a trial at bar, and not at *nisi prius*. They were of opinion that that objection must prevail. It was a very short point, and depended entirely upon section 2 of the Judicature Act when read in connection with the authorities cited by Mr. Mitchell. That section gave to the Court all the powers possessed by the Courts of common law in England. It was as follows:—The Supreme Court shall have cognisance of all pleas, civil, criminal, or mixed; and subject to any enactment now in force to the contrary, shall have jurisdiction in all cases whatsoever as fully and amply to all intents and purposes as Her Majesty's courts of Queen's Bench, Common Pleas, and Exchequer, at Westminster, or either of them have or had by the common law in England." They had therefore to see what was the jurisdiction of the courts of common law in England in cases of this kind. The practice and procedure were stated in *Corner's Crown Practice*, 142, to be that all causes of the Queen in this Court must be tried at the bar if the Attorney-General will not grant his warrant of *nisi prius*. The authority referred to for that is *Reg. v. Sir Jacob Banks*, 6 mod. 361, in which it is very distinctly laid down that all causes of the Queen in the Queen's Bench must be tried at bar if the Attorney-General will not grant a warrant of *nisi prius*. That authority has since been cited in all the text-books, and had never been questioned. There was no doubt, therefore, that in the jurisdiction of the Court at common law, where a case is brought by the prothonotary, it must be tried at bar unless the Attorney-General has granted his warrant of *nisi prius*. The Court was therefore of opinion that this case had been irregularly tried, and the trial would be set aside. Under the circumstances no costs of the rule would be given.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

THE QUEEN v. ROONEY. Oct. 4.

Evidence — Criminal trial — Evidence cannot be given of a statement made by a witness at a previous trial — What a prisoner says or does at a previous trial is admissible.

This was a special case stated by the Chairman of the General Sessions at Melbourne for the opinion of the Court. The case stated that John William Rooney had been presented on the charge of having broken and entered the warehouse of John Brown, and in a second count with receiving the boots knowing them to have been stolen. The theft from Mr. Brown's warehouse occurred on the 7th February, 1884. Some days thereafter the boots so stolen were brought in a cab and delivered to the accused. About the 27th February, 1884, the prisoner went to the office of Messrs. Halton and Co., Melbourne, and asked them to ship for him these boots and other things to Mauritius. The boots were shipped by the French steamer *Salazie*, which left Hobson's Bay on the 29th March, 1884. The prisoner was a passenger by the same vessel. The police authorities of Mauritius seized the boots, which were then in the possession of Mr. Pulvenis, of Port Louis, and on the 8th July, 1884, Sergeant Lovie, of the Melbourne police, arrived there, with a warrant for the arrest and extradition of the accused. Sergeant Lovie was examined as a witness at the General Sessions, and stated that he was present in the police court, Port Louis, on the 10th July, when Mr. Pulvenis was examined; that the proceedings, including the evidence of Mr. Pulvenis, were in the English language; that the prisoner was present and heard what was said, and at the close of Mr. Pulvenis's statement the magistrate asked the prisoner if he desired to ask any questions, and that he said he did not. It was then proposed, on behalf of the Crown, to ask what statement did Mr. Pulvenis make, but the prisoner's counsel objected. The question was allowed, but the point was reserved for the consideration of the Supreme Court. The following evidence was then given by Sergeant Lovie:—" Mr. Pulvenis said that two months previously the prisoner brought to him a quantity of boots and asked certain prices for them, which he could not agree to. The prisoner then asked him to sell them for him on commissiom; prisoner brought to him 111 pairs of boots, out of which he sold five pairs. The prisoner then asked me (Lovie) to compare the boots I brought from Melbourne with the sample of boots brought into court by Mr. Pulvenis. Mr. Pulvenis, the prisoner, and I compared them, and we found the samples corresponded with each other, except that some private marks which were on those I brought from Melbourne appeared to be obliterated on those found in Mauritius. After the comparison was made Mr. Pulvenis said to the prisoner that he was quite sure the two samples belonged to the same lot of boots. To this the prisoner said nothing." The prisoner was convicted of receiving, but sentence was respited pending the decision of the Supreme Court on the question whether the evidence was admissible.

MR. CHOMLEY and SIR BRYAN O'LOGHLEN appeared for the Crown in support of the conviction; MR. C. A. SMYTH for the prisoner.

MR. JUSTICE HIGINBOTHAM said that there appeared to have been a link wanting in the proof of the case, namely, that the prisoner had brought a quantity of boots to Mr. Pulvenis at Port Louis. Mr. Pulvenis was not called as a witness at the General Sessions to prove that the prisoner brought

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the boots to him, but a sergeant of police was called, who was present at the police court, Port Louis, when the prisoner was brought before that court. He gave evidence as to what Pulvenis said in Court, and what was afterwards said and done by Pulvenis, the sergeant, and the prisoner. This evidence was objected to, on the ground that the facts must be proved by the direct testimony of Pulvenis himself, and not by a person who heard him give his evidence. It was contended for the Crown that the evidence was admissible, not as evidence of the truth of the statements, but of admissions by the prisoner that he took the boots. What a prisoner said or did in a court of law, where he was not influenced by fear or hope to make an untrue statement, was properly admissible. In this case the Court was of opinion that a portion of the evidence objected to was admissible against him, namely, that part in which it was stated that he asked the boots to be compared. But that meant nothing; it was not an admission that he was the person who took the boots to Pulvenis. The earlier portion of the evidence of the statement by Pulvenis that prisoner had taken the boots to him was not admissible, nor was the latter part of his evidence admissible It was not an admission that as a fact the prisoner took the boots to Mauritius. As the most important part of the evidence was not admissible, the conviction would be quashed.

Mr. Justice Williams was of the same opinion. A statement by the prisoner on his conduct might be received in evidence. The fact of his asking for a comparison of the boots and the result of that comparison was admissible in evidence. But the most material parts of the evidence that had been admitted were the two other portions which were inadmissible.

Mr. Justice Holroyd said that they should be extremely cautious in admitting evidence of the class that had been objected to in this case. A jury was likely to be very much influenced in coming to a verdict by evidence of statements made in presence of the prisoner of the very things which it was necessary to prove for the purpose of a conviction. It was to be assumed that there was no other evidence except this statement as to what was said in Court that prisoner brought the boots to Pulvenis. If that evidence were admitted, the prisoner would be deprived of his opportunity of having the most important piece of testimony against him tested by cross-examination. He was entitled to have on his trial Pulvenis placed in the witness-box to state that the prisoner brought him the boots, and to be then and there cross-examined in reference to it. The other evidence as to what was said after the comparison of the boots was still less admissible. The mere fact that the prisoner held his tongue did not justify its being received in evidence. He was entitled to hold his tongue. He need not take the slightest notice of what was said, and the fact that he said nothing in the police court could not be an admission against him.

Conviction quashed.

(Before their Honors Mr. Justice Williams and Mr. Justice Holroyd.)

Norton v. Williamson. Oct. 4.

Action for breach of an agreement terminated by third party—Onus of proof lies on plaintiff to show the authority of the third party—Where an agreement is ambiguous documents of the preliminary negotiations may be looked at to ascertain the intention of the parties.

Rule *nisi* for a nonsuit, or to reduce damages.

Mr. Purves and Mr. Hood moved the rule absolute; Dr. Madden and Mr. Hodges showed cause.

The action was brought by Mr. Fleming Norton against Messrs. Williamson, Garner, and Musgrove, to recover damages for breach of an agreement to employ him to give an entertainment in different parts of the Australian colonies. The plaintiff gave his entertainment several times in Melbourne and the country districts. There were some disputes between the plaintiff and the defendants and the defendants' agent, Mr. Jinkins. Ultimately, at Albury, Jinkins cancelled the agreement that the plaintiff had entered into with the defendants, and the plaintiff claimed damages in consequence. At the trial a verdict was given for the plaintiff, but the defendants applied for a nonsuit on the ground that there was no evidence that Jinkins had any authority from them to cancel the agreement, or that they had ratified his act. It was also sought to reduce the damages by two sums of 10s. and £1 3s. 4d., allowed by the jury to the plaintiff for the hire of a piano and the carriage of plaintiff's baggage.

Mr. Justice Williams said that a rule *nisi* had been obtained to set aside a verdict for plaintiff and enter a nonsuit on the ground that Jinkins had no authority to put an end to the contract between the plaintiff and the defendants. There is no doubt that the onus of proof was not on the defendants but on the plaintiff, to show the authority or else facts from which the authority might be presumed. In his opinion there was evidence of the authority When the plaintiff started on this tour the defendants were unable to leave Melbourne, as they had to look after their business here, and they told him that they were going to send Jinkins with him on his tour as their manager, and in charge of the tour. From the conversation that Williamson had with the plaintiff on the subject the jury were at liberty to draw the inference that Jinkins was, so to speak, the *alter ego* of the defendants. Until the tour came to an end, or until he was recalled, he, to all intents and purposes, represented the defendants, and had authority to dismiss anyone engaged on that tour. It was also said that the verdict was against evidence, and that there was the direct

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evidence of Williamson, Garner and Jinkins that Jinkins had no authority. But it might be that private instructions were given to Jinkins which would affect the position as between the agent and the principals but which would not affect the position of the principals and a third party. Jinkins' evidence was that he acted without communicating with the defendants, but he gave no explanation of that. And the defendants' telegrams were inconsistent with Jinkins not being in a position to do an act of this kind. It was open for the jury to say that they did not believe the defendants' evidence, as it was inconsistent with their acts. The verdict ought not to be disturbed on that ground. But it was said that the damages ought to be reduced by a sum of 10s. paid for the hire of a piano paid by the plaintiff. The amount was small, but it was a difficult point. But he thought the verdict might be sustained for this amount on the ground that the contract in reference to the piano was contained in letters from plaintiff to defendants, and after that the agreement was drawn up. That agreement being ambiguous as to whether the plaintiff was to provide, they might look at the other documents of the preliminary negotiations. The fact that in the agreement it was stipulated that the plaintiff should provide his complete entertainment and a pianist, and making no mention of a piano, raised the supposition that the defendants were to provide the piano. It also appeared that when the plaintiff did arrive in the country and gave his first entertainments, the defendants did provide a piano. The next question related to a sum of 34s. for fares, being sums paid by plaintiff for the carriage of his luggage. The defendants were to pay all fares. The meaning of that term in the contract was doubtful, and theatrical usage had been incorporated as a term of the contract. There was a great mass of evidence that in theatrical management and usage an agreement by the proprietors or lessees to pay all fares included fares for baggage, as dresses, &c. Both these matters being ambiguous were left to the jury, and the jury found in favor of the plaintiff. There was no reason to disturb their verdict.

Mr. Justice Holroyd reviewed the evidence, and said he was also of opinion that there was ample evidence that Jinkins was the agent of the defendants for the purpose of dismissing the plaintiff; that he had ample power to use his discretion in that matter, if he saw fit in the interests of the defendants to do so. As to the minor points, he thought the contract must be considered together with the letter prior to the contract, so far as regarded the payment for the piano. The meaning of the letter of the plaintiff to defendants was that the entertainment was to be considered complete so far as he was able to supply it without a piano. The contract contemplated the use of a piano, but that was not to be supplied by plaintiff, who was only to supply a pianist. As to the fares, there was evidence that where the parties undertook to pay fares it included extra baggage.

Mr. Justice Williams said that he desired to add that Mr. Justice Higinbotham, who had heard the arguments for the plaintiff and those of Mr. Purves for the defendants, concurred with the other members of the Court.

Rule for a nonsuit or to reduce damages discharged.

Sittings in Banco.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

The Queen v. Nicolson, *exparte* Minogue.

Married Women's Property Act 1871 (*No.* 384), *sec.* 18—*Licensing Act* 1876 (*No.* 566), *sec.* 50, *sub-div.* 3—*A married woman cannot hold a licence.*

Rule *nisi* calling on the licensing police magistrate at Kyneton to hear an application by Catherine Minogue for the transfer to her of a publican's license for the Clare Castle Hotel, Kyneton. The police magistrate refused the application for a transfer, on the ground that the applicant was a married woman, and that by the 50th section of the Licensing Act a married woman could not hold a publican's license.

Dr. Madden moved the rule absolute; Mr. J. T. T. Smith showed cause.

Mr. Justice Higinbotham said: This was a rule calling on the licensing stipendiary magistrate for the licensing district of Kyneton to show cause why he should not hear and determine an application by Catherine Minogue, a married woman, for a transfer to her of a publican's license for the Clare Castle Hotel, Kyneton. The applicant is a woman living with her husband, a contractor, whose business compels him occasionally to be absent from his place of residence. It appeared by the affidavits that the applicant had paid for the furniture, goodwill and the license of the hotel, in respect of which she had applied for a transfer, with her own money, consisting in part of her earnings while she was licensee of another hotel in the same town. It was to be assumed, therefore, for the purpose of the question now to be determined, that the applicant is a married woman having property to her separate use. The magistrate refused her application because, as he states in the affidavit which he has made and filed for information of the Court, he was of opinion that, having in view the provision contained in section 50 of the Licensing Act 1876, by which the license held by a female shall, upon her marriage, confer upon her husband the same privileges, and shall impose on him the same duties, obligations, and liabilities as if such license had been granted to him originally, a married woman living with her husband cannot legally hold a publican's license. He was unable to concur with his learned brethren

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in the opinion that this was a sufficient reason for refusing to hear and determine this application for a transfer. That a licensed person under the act might be a female appeared from this and other provisions of the 50th section. In the ordinary case of the marriage of a licensed person, being a female, the property in the licence, together with her other personal property, would, in the absence of provision for securing it to her for her separate use, pass to her husband; and this clause, as it seemed to him, did no more than direct that in such a case the privileges and also the duties, obligations, and liabilities of a licence should pass, together with the property in the licence, to the husband. But this provision in no way interfered with or over-rode the law which allowed a married woman to acquire and hold separate property, or the requirements of this act which imposed certain obligations upon the person, whether male or female, married or unmarried, who possessed this particular kind of property. A married woman was not expressly prohibited from obtaining a legal right to a publican's licence as her separate property, and if that were so there was nothing in this act, he thought, to prevent a married woman, who had gained a qualified independence by virtue of possessing separate property of this kind, from applying for a licence to be issued or transferred to her. The construction which the magistrate had put upon this clause of the 50th section would disqualify every married woman, whether she be living with her husband or not, from holding a publican's licence. If the Legislature intended to make coverture a disqualification, that intention would probably have been expressed in briefer and more direct terms. Reliance had been placed upon the fact that all licensed persons were subject to penalties for offences committed against this act, and it had been argued that a married woman would be exempted from such penalties, as she would be presumed to have acted under the coercion of her husband. Of this doctrine of the presumed coercion of a wife by her husband, and that such coercion excuses her, it has been observed by Mr. Justice Stephen (*Digest of the Criminal Law*, note 2, p. 333) that it is a doctrine "uncertain in its extent and irrational as far as it goes; it is besides rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances." It might well be doubted whether this doctrine of presumption could apply at all to a case where certain liabilities were expressly imposed and privileges were conferred by statute upon all licensed persons without distinction of sex or *status* in regard to marriage. But even if the presumption did apply, the interpretation of the act of Parliament ought not, in his opinion, to be governed by conjectures as to the mischievous consequences likely to flow from the application of a rule which, as the same authority observed, "is tolerable only because it is practically evaded on almost every occasion where it ought to be applied" (*Ib.*, p. 336). This act did not expressly, or by necessary implication in any part of it, disqualify a married woman living with or apart from her husband from holding a publican's licence. He was of opinion, therefore, that this application was one which ought to be heard and determined on its merits, and that the rule should be made absolute without costs.

Mr. Justice Williams thought the rule should be discharged with costs. The question turned chiefly on the first few lines of a sub-section of clause 50 of the Licensing Act 1876, but as some reliance might be attached to sec. 18 of the Married Women's Property Act, it would be as well to look at that statute first. Sec. 18 of the Married Women's Property Act provided that "every married woman having property for her separate use shall be considered as a *femme sole* for the purposes of contracts, and wrongs and injuries, and suing and being sued in any civil proceeding." It appeared to him that the holding of a licence by a married woman was not one of the purposes mentioned in sec. 18. She could not be considered a *femme sole* for that purpose. It was not absolutely necessary to decide that point in this case, because even if she were to be considered a *femme sole* there was a prohibition in the latter act, the Licensing Statute passed in 1876, against a married woman holding a licence. Section 50 of the Licensing Act. sub-sec. 3, enacted that in case of the marriage of any female being a licensed person, the licence held by her shall confer upon her husband the same privileges, and shall impose upon him the same duties, obligations, and liabilities as if such license had been granted to him originally." There were no words of qualification or limitation in that sub-section. The words were very large. There was no limitation of them to a female not having separate property, and the Court would be doing violence to the act if they were to hold in the teeth of these words that a married woman could hold a licence. As to the presumption of law to which reference had been made as to a married woman in certain cases acting under the coercion of her husband, it existed. The Legislature must have had this presumption before it when passing the act. Offences were created by the statute, heavy fines were imposed, and in some instances imprisonment was provided. Even if she had separate property to her own use, the Legislature might say it would not put her in a position where she might be subject to these penalties. He thought the magistrate was right in refusing the license.

Mr. Justice Holroyd was of the same opinion. According to the ancient law a husband and wife were supposed to constitute one person, and although that doctrine had to a great extent been abrogated by recent legislation, it still existed for certain purposes, so far as regarded liability under

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the criminal law and certain other cases. He thought the Licensing Statute contemplated such a state of things as marital control still being continued, and had in view the fact that a wife would be held excusable for certain things done by the possible coercion of her husband. Section 50 did not expressly state that a married woman should not hold a licence, but it plainly assumed it, for it provided that in case of the marriage of a woman, the licence held by her should confer upon her husband the same privileges, impose the same duties as if it had been granted to him in the first instance. The husband was put in place of a wife. The section would be unmeaning if a wife was to hold a licence after marriage when it was expressely provided that on her marriage the obligations, duties, and liabilities in reference to it should pass to her husband. She might get a licence against the wish of her husband, subject to the discretion of the magistrate. He thought it was not intended that a married woman should hold a licence. The magistrate was right in refusing the transfer of the licence.

Rule to compel the police magistrate to hear and determine the application for a transfer discharged, with costs.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

MAUDOIT v. ROSS. Nov. 3.

Principal and Agent—Wrongful act—Ratification—A father is not legally responsible for his son's trespass unless the relation of principal and agent exists between them—A wrongful act, in order to be capable of being ratified so as to make the ratifier liable for the wrong, must be an act done by a person professing to act for the use or benefit, or by the authority of the party who is afterwards said to have ratified it—Evidence of ratification.

This was an appeal from the County Court at Alexandra.

MR. TAYLOR for the appellant; MR. SKINNER for the respondent.

The plaintiff, Jules Maudoit, sued the defendant, Colin Ross, for damages for driving away some cattle and converting them to his own use. The case for the plaintiff was that the defendant's sons had gone on to the plaintiff's land to take away a steer belonging to the defendant; that with the steer they took away about nine or ten head of cattle belonging to the plaintiff, and that the plaintiff had not since obtained possession of the cattle taken from him. It was alleged for the plaintiff that the defendant had ratified the act of his sons in taking away the plaintiff's cattle. A verdict was given for the plaintiff for £16, and defendant appealed on the ground that there was no evidence that he ratified the act of his sons.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said,—Appeal from the County Court at Alexandra. The defendant's two sons, aged 13 and 11, left their home to find and recover a steer of their father's which had strayed into the plaintiff's paddock. They took the steer from the paddock, and with it eight head of cattle of the plaintiff, and in spite of the remonstrances of neighbors, who told the boys they were taking away the plaintiff's cattle, they drove the cattle to their father's gate, a distance of more than two miles, where they left them, and most of the animals were, in consequence, lost. The defendant, driving in a buggy in company with another person, met his sons on the road and spoke to them, but it does not appear what took place between them. The plaintiff sued the defendant for the damage resulting to him from the sons' trespass, and the jury found a verdict for the plaintiff for £16. The question to be determined is, whether there was any evidence to support the verdict. The relationship existing between the defendant and the actual wrong-doers must be excluded from consideration in dealing with this question. A father is not legally responsible for his sons' trespass unless the relation of principal and agents exists between them. See *Moon v. Towers*, 8 C. B. N. S., p. 615, a case similar in some of its legal aspects to the present. It is admitted that there was no evidence of previous authority given by the defendant to his sons to commit the act complained of. But the learned judge of the County Court has held that there was evidence of ratification by the defendant. A wrongful act, in order to be capable of being ratified so as to make the ratifier liable for the wrong, must be an act done by a person professing to act for the use or benefit, or by the authority of the party who is afterwards said to have ratified it (*Wilson v. Barker*, 4 B. & A. D. 614; *Bird v. Brown*, 4 Ex., at p. 799). It does not clearly appear that the defendant's sons professed to act for the benefit or by the authority of anyone in driving away the plaintiff's cattle. Their motive may have been mischief merely, or they may have thought that it would have been easier to drive several head of cattle than one. But assuming that their act was one that could be ratified, we are of opinion that there was no evidence of ratification in fact. Evidence of ratification consists of proof of acts or words showing an election of the ratifier to adopt as his own the act of another known to him, and done by that other for his benefit or in his name. Mere knowledge of the act of the agent is not ratification, although knowledge is a necessary element of ratification except where there is an intention to adopt the act at all events and under whatever circumstances (*Freeman v. Rosher*, 13 Q. B. p. 780; *Phosphate of Lime Company v. Green*, L. R. 7 C. P., p. 56. There must be evidence either of participation in the advantage resulting from the act, as, for instance, by receiving the proceeds of an irregular sale, as in *Hunter v. Parker*, (7 M. W., p. 322), or

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of express approbation of the act, as in *Buron v. Denman* (2 Ex., p. 167). In the present case all the elements of a legal ratification are absent. The defendant derived no profit or advantage from the wrongful act of his sons. It does not appear that he was even aware at the time he parted from them on the road that they would continue to drive the cattle to the place where they left them. The defendant never expressed approval of his sons' act. On the contrary, he intimated his opinion in a conversation with the plaintiff some time afterwards that his sons' conduct had been wrong, and furnished just ground of complaint, as it undoubtedly did. We think that there was no evidence to support the verdict. The appeal will be allowed with costs. A nonsuit, with costs, will be entered for the defendant in the County Court.

Nov. 3.

THE QUEEN v. M'CORMICK, *exparte* M'MONIGLE.
THE QUEEN v. M'CORMICK, *exparte* LINDSAY.
THE QUEEN v. M'CORMICK, *exparte* HAMMOND.
THE QUEEN v. O'CONNOR, *exparte* BENITTO.
THE QUEEN v. O'CONNOR, *exparte* CONWAY.

Licensing Act 1876 (*No.* 566), *sec.* 54—*The convicting justices have no power under sec.* 54 *of the Licensing Act* 1876 *to award imprisonment in default of insufficient distress for payment of a fine.*

In these cases convictions had been made by justices for selling liquor without a licence, contrary to the provisions of sec. 54 of the Licensing Act. It was sought to quash the convictions on the ground that the justices, when making the convictions, inflicted a fine of £25, with costs, instead of awarding imprisonment, and they directed that in default of payment distress should issue, and in default of sufficient distress, one month's imprisonment.

MR. BOX appeared in support of the convictions; MR. ISAACS appeared in support of the application to quash the convictions in the cases of M'Monigle, Lindsay, and Hammond; MR. BARRETT appeared in support of the application to quash the convictions in the cases of Benitto and Conway.

MR. JUSTICE HIGINBOTHAM said,—An order *nisi* was granted in each of these cases to quash a conviction for selling liquor without a licence, contrary to sec. 54 of the Licensing Act 1876. Section 54 provided that any person who shall sell any liquor without a licence shall forfeit and pay for the first offence any sum of not less than £25, nor more than £50, or shall be liable to imprisonment for any term not less than one month, nor exceeding three months. The power of imprisonment was here given, not as a means of enforcing payment of the penalty, if a penalty be awarded, but as a distinct original punishment. In each of these cases the justices inflicted a fine of £25 with costs, instead of the alternative punishment of imprisonment, and they added in their order "distress in default of payment, and a term of one month's imprisonment in default of sufficient distress." The objection had been taken to all of these convictions that the justices had not power to award imprisonment in default of distress, and he regretted to state that the objection was, in his opinion, good and must prevail. Where a penalty is imposed under the authority of an Act of Parliament, it is beyond doubt that payment can be enforced only by the means and in the way provided by the same or by some other act of the Legislature. Where the particular act under which the penalty was imposed was silent as to the mode in which payment was to be enforced, and where no general provision had been made by an act of Parliament for enforcement of payment in such case by distress and imprisonment, a warrant of distress or a warrant of commitment could not be issued, and a conviction which ordered distress or imprisonment in default of payment will be a bad conviction. But where the statute under which the penalty was imposed was silent as to the mode of enforcing payment, if a general statutory provision existed applicable to the particular case by which the issue of a warrant of distress or of a warrant of commitment was authorised, it was, in his opinion, clear law not only that either of these warrants might be issued by any justice after the case had been heard and determined (see the Justices of the Peace Statute 1865, section 11) for the purpose of enforcing payment, but that the adjudicating justices might, if they thought fit, include an order for the issue of one or both of those warrants in the conviction as a part of their adjudication, and that no valid objection could be taken to the conviction on the ground that it included either or both of those means of enforcement. He was not aware of any case before the present in which this view had been called in question. It was undoubtedly the view of the learned author of the general procedure acts known as Jervis's Acts, which were introduced into Victoria at an early period, and were now embodied in the Justices of the Peace Statute 1865. This appears from the fact that all the three general forms of conviction given in the second schedule, and which were plainly intended to include all cases whatsoever in which distress or imprisonment, or both, could be applied, either to enforce payment of the penalty, or, in the case of imprisonment, as an alternative punishment (see section 111, and forms 39, 40, 41 in the second schedule) contained distress or imprisonment as a part of the sentence of the adjudicating justices; the form of the warrant of distress recited this part of the conviction as a portion of the adjudication (see form 47), and the form of the warrant of commitment in like manner recited the foregoing recital in the warrant of distress (see form 51). But it was contended, and he thought successfully, that the general procedure sections of the Justices of the Peace Statute 1865, which bore on this point (sections 111 to 125) did not contain

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a general power to award imprisonment as a means of enforcing payment of the penalty in the cases now under consideration. The Act imposing the penalty, like the majority of Acts passed since the general system of procedure was introduced, was silent, and provided no remedy at all in case the penalty was not voluntarily paid. For a considerable time after Jervis's Acts were passed it was supposed that section 22 of 11 and 12 Vic., c. 43, of which section 123 of the Justices of the Peace Statute 1865 is in substance a copy omitting the recitals, applied to and authorised imprisonment in such a case. But if the comma (which is not a part of the act of Parliament) after the word "remedy" in the second line be omitted, this section, like the corresponding section in the English Act, will be found to apply only to the rare cases where the statute on which the conviction was founded authorises the issue of a warrant of distress, and to have no application to the far more numerous cases, including the present, where the statute on which the conviction was founded provided no mode at all of enforcing payment. This construction of the section was adopted with authority, and a remedy was applied by the English Act, 21 and 22 Vic., c. 73, sec. 5, which provided that sec. 22 of the English Act, 11 and 12 Vic., c. 43, should extend to all cases where the statute on which the conviction or order was founded provided no mode of levying or raising the penalty, compensation, or sum of money, or of enforcing payment of the same, as well as to cases where the statute on which the conviction or order was founded authorises the issue thereon of a warrant of distress. This amending English Act appears to have been overlooked by the framers of the Justices of the Peace Statute 1865, and of the later amending acts, and as it has no place on the statute book of Victoria the Court was constrained to accept the construction put by the English Legislature upon the terms of the section from which our section 123 is copied, and to hold that as neither the Licensing Act 1876, nor the general procedure sections of the Justices of the Peace Statute 1865 provide the remedy of imprisonment to enforce payment of these penalties, the convictions ordering imprisonment were bad. The adoption of section 5 of 21 and 22 Vic., c. 73, would, he thought, entirely remove this ground of objection to the form of conviction in most frequent use. He desired to state precisely the ground on which his judgment in this case rested. Another view of sec 123 of the Justices of the Peace Statute 1865 had been suggested in argument in connection with a recent decision of this Court in *Reg. v. Perry, exparte Brown* (10 V. L. R. (L.) 114.) It was to the effect, as he understood it, that in all cases coming within the scope of this section the convicting justices had no power to make imprisonment a part of their adjudication, and that the justice to whom the return of insufficient distress was made, or some other justice at that stage of the case had alone jurisdiction to award imprisonment, and to fix the term. He strongly dissented from that view, which, if it be adopted, must disturb the old and well-established practice in this department of the administration of justice. If it be correct, it will follow from it as a consequence that the committing justice was invested by this section with judicial, and not merely discretionary administrative powers, and that a defendant must in all cases be summoned to appear and be heard before he could be committed. It was held by this Court, in the reserved judgment of *Warr v. Templeton* (3 V. R (L.) p. 56), that the act of the committing justice was a ministerial act, and that no summons to show cause was necessary before signing the warrant of commitment. The English practice appeared to be the same. See Oke's *Magist. Synop.*, 9th edition, p. 170; see, also, p. 163. Full effect would only be given to this 123rd section by holding that it confers by implication on the convicting justices the power of including in the conviction a term of imprisonment limited to three months, as well as on the committing justice the power of issuing a warrant of commitment for the same or any shorter term, and that it gave in addition to the committing justice a discretion, notwithstanding the previous adjudication of imprisonment by the convicting justices, to refrain, if he thought fit, from issuing a warrant of commitment at all. The orders to quash the convictions in all these cases must be made absolute, but without costs. The defeat of justice which the Court is now compelled to sanction might, they venture to hope, lead to a legislative remedy being applied at no distant date. The language of the statute law on this subject now presented a snare to justices of the peace in the discharge of this highly important and at the same time difficult part of their duties.

MR. JUSTICE WILLIAMS said that he concurred in the result of the judgment, but not in the reasons given by his colleague. He based his judgment on the ground that the convicting justices had no power to award a term of imprisonment in default of distress. It was quite consistent that the convicting justices might be the persons to whom the application might be made to order imprisonment in default of distress, but he thought they had no power to do so in the original order on conviction. Section 111 of the Justices of the Peace Statute provided that in all cases of conviction, where no particular form of such conviction shall be given by the statute creating the offence, or regulating the prosecution, the justices who convicted might draw up the conviction in one of the forms on the second schedule applicable to the case. But that applied only to the form of the conviction, and if they were to give a larger effect to that section they would be in effect saying that, where a special statute created a special offence and provided something in the nature of a form of

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conviction, an order would be good if it followed the form in the schedule to the Justices of the Peace Act. The present cases were an illustration of that. The Licensing Act, section 54, provided that any person who should sell any liquor without a licence authorising such sale should forfeit and pay a sum of not less than £25, or be liable to a term of imprisonment for any term not less than one month nor exceeding three months, and that it should be part of the order that all liquor in the possession of the defendant should be forfeited. It was to be part of the conviction that the liquors should be forfeited; but if the argument in support of these convictions was good, it would be sufficient to follow the form in the schedule to the Justices of the Peace Statute and omit the order for the forfeiture. Two cases had been relied upon in support of the argument that the conviction was sufficient—*re Allison*, 10 Ex. 561; *re Howe*, 21 L. J. M. c. 94. But those cases were distinguishable from the present. The defects were those of form and not of substance. In the present cases the objections were certainly of substance. It was a substantial part of the conviction to order imprisonment. He referred to sections 117 and 123 of the Justices of the Peace Statute. The latter section provided that where the statute on which a warrant of distress, or conviction, or order is founded, provides no remedy in case it be returned, a warrant of distress thereon, that no sufficient goods of the party against whom such warrant shall have been issued can be found, the justice to whom such return is made, or any other justice if he think fit, may, by his warrant, commit the defendant to the nearest gaol for any term not exceeding three months unless the sum be paid. This was inconsistent with the justices in their original order awarding a term of imprisonment. Those justices would have more of the facts before them on which to make an order for imprisonment. The justices to whom the distress warrant was returned unsatisfied had a discretion, and they might take into consideration any aggravating or mitigating circumstances. Reference had been made to a previous decision of the Court in the *Queen v. Perry, exparte Brown*, 10 V.L.R. (L.)144. He thought that decision was right. The convicting justices had no power to award imprisonment in default of insufficient distress or payment of the fine. The conviction should be quashed.

Mr. Justice Holroyd said he concurred in the opinion of Mr. Justice Williams. Section 123 of the Justices of the Peace Statute contained provisions that where no sufficient distress was found the defendant might be committed by a justice to whom the warrant of distress was returned, or by another justice if he thought fit. That justice might possibly fix a less term than the convicting justice would have done. He had to take all the circumstances of the case into consideration. He concurred with the result that the conviction should be quashed, but he did not agree with the reasons of Mr. Justice Higinbotham.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Molesworth.)

Morrissey v. Clements. Oct. 8.

Transfer of Land Statute 1866 *(No.* 301), *sec.* 42 *—Unregistered lease—Destruction — Statute of Frauds—Sec.* 42 *of the Transfer of Land Statute does not make a lease which is not registered void, but makes it of no effect as against a subsequent registered conveyance of the land—If a lease be destroyed so that its registration be made impossible it would still be valid between the parties as a contract.*

This was a suit by the plaintiff, as administratrix of the estate of Michael Morrissey, a farmer near Beechworth, against Richard Clements, seeking to have it declared that certain land now held by Clements should be transferred to her. Morrissey had given to the defendant a transfer of the property, according to the plaintiff, mainly to secure an advance of £270 made to him by Clements. The transfer was, however, in form an absolute one. The plaintiff desired to be allowed to redeem the property on payment of what was due. The defendant asserted that the property had been purchased by him, and not taken under mortgage.

Mr Topp for the plaintiff; Mr. Webb, Q.C., and Mr. Goldsmith for the defendant.

His Honor, in giving judgment, said: Mr. Morrissey held leases under the Land Act of one allotment containing about 140 acres, and another about 20 acres. On January 18, 1879, he mortgaged the former under the Act 301 to the defendant, Mr. Clements, for £200 at 8 per cent. Wanting £70 more, he made an arrangement releasing the first mortgage, and taking transfers of both allotments as for the sum of £270, and making a lease of them to Morrissey for three years at a rent payable half-yearly equal to 8 per cent. on £270. This was, in effect, made the same as a mortgage, and regarded by the parties as such. In some incidents it would differ from it. The borrower would have an option of paying the money and getting back the land or removing it; the lender the remedies of a landlord to enforce rent, and getting rid of the borrower by his mere omission to purchase. The defendant executed a release of the mortgage, and Morrissey, on January 5, 1881, made an absolute transfer to him as for £270, and on January 14, 1881, defendant executed a lease to Morrissey for three years as from November 29, 1880, at a rent of £10 10s., payable half-yearly in advance, with a right to purchase at the end of three years for £270. The additional £70 was applied partly to previous payments to Morrissey, part to the balance of rents payable to the Crown to complete the title, the costs of the conveyances, and the balance, £10 7s. 5d., to Morrissey. Mr.

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Tuthill, solicitor, acted for both parties in the matter. The defendant alleges that within a fortnight of the date of the lease he and Morissey agreed to a new arrangement in consideration of his lending Morrissey a further sum of £30, secured by his promissory note at three months, the right of purchase being given up, the lease being cancelled; and that the lease was destroyed by Morrissey, the loan of £30 made, and the promissory note given. The value of the land is very material as to the probability of the defendant's story. I have the evidence of five witnesses (neighbors) valuing the land at that date at £4 an acre (£640). There is one witness on the other side, an auctioneer, living 13 miles off, who says he has seen it frequently, not going over it, having gone specially recently to qualify him to give evidence, not going upon it. He values it at the period in question from £1 15s. to £2 an acre. On the whole I conclude that the land was worth much more than £270, and an ample security for it as a debt. Several witnesses, Messrs. John Carmody, Daniel Carmody, and Sutton, have proved distinct conversations with defendant in 1881-1882, in which he spoke of Morrissey as a very punctual payer of interest, and as entitled to redeem the land. Defendant gave Morrissey a series of receipts for half-years' interest or rents in advance to November 29, 1881; another date November 29, 1881, for six months' interest in advance; then June 16, 1882, as for half-year's rent in advance, due May 29, 1882. The relation of the parties might produce a confusion between the words interest and rent as long as the lease continued. The word rent would show the existence of the lease as much as the word interest. The defendant has stated very indistinctly a verbal agreement for a tenancy on the same terms as the lease. He gave another receipt as for half-a-year's rent, due November 29, 1882. The defendant has some corroboration as to his account of the cancellation of the lease from Tuthill. He says Morrissey came to him shortly after he got the lease and asked for it, and said that he and defendant had made fresh arrangements, that Morrissey was several times afterwards in his office, and spoke to him as if he knew all about it, which he did not; that he said that the lease was at an end, as if complaining that he might be turned out of the land; that Morrissey said that he did not wish that the matter of the lease being ended should be known. Morrissey gave defendant a promissory note, December 21, 1882, for £50, which he says represented the £30 paid at the cancellation of the lease, accumulations, and renewals. Morrissey died March 11, 1883. His widow, Maria, the present plaintiff, on March 29, 1883, paid the defendant £10 16s., being according to a receipt which he prepared, and she kept "six months' rent in advance for the farm rented of me by her late husband, and in the occupation of which she may continue as my tenant at will at the same rent." Neither party was questioned as to what occurred on this occasion. The plaintiff took administration to Morrissey *cum testamento annexo* (he left her all his property) on July 17. On that occasion she swore to an account of his assets, in which she said nothing of his interest in the allotments. She stated a debt due to the defendant of £50, and, after some questions, paid it to him. Tuthill seems to have heard something of her claim to the land, and was furnished with a copy of her statement as administratrix. Some time, I think, in November, 1883, she, accompanied by three witnesses, went with £270, and a copy of the lease, which she had, and offered to pay the £270, which the defendant refused, saying there was no debt due to him on the land, and the land was his. After some words defendant's wife suggested that she should go to Tuthill, and they all went. Defendant stayed but a short time, probably thinking it better to have the conversation carried on in his absence. There is a good deal of conflict as to various points, as to the conversation with Tuthill. He says that he told them that the lease had been cancelled. This they deny. They cross-examined Tuthill as to concession of the registration of the lease. Tuthill began cross-examining the plaintiff as to the statement of assets which she had made and sworn to. She denied it as on the copy shown to her. On the whole I am inclined to think that Morrissey did get the lease from Tuthill with an intention of cancelling it, and did in fact destroy it, but I entirely disbelieve the defendant's statement that he agreed to abandon the right. I think that he and Morrissey contemplated a substituted arrangement, probably some document securing £270 and further advances. The plaintiff made a subsequent tender on the proper day, November 27, 1883, of £270, which defendant refused. If the defendant's story of the cancellation with intent to defeat the estate were true, I do not think that it would, regarding the Statute of Frauds, destroy his right to the term of three years and the right to purchase at the end of them (*Doe and Crewtail v. Thomas*, 9 B. and C. 288; *Botting v. Martin*, 1 Camp. 317; *Mollett v. Brayne*, 2 id. 104). The defendant's counsel insist that it is otherwise under the act 301, section 42, saying that documents shall be of no effect until registration. I read that with reference to the effect upon the land only, and would say that plaintiff would have no title to the land as against a registered conveyance from the defendant, and that the cancellation made the registration impossible. But I think notwithstanding that clause that an unregistered document, as the lease, would be valid between the parties as a contract, and that notwithstanding its destruction. But if I believed the defendant's story I would not think the plaintiff entitled to the assistance of a court. I am inclined, regarding Tuthill's evidence, to think that

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Morrissey intended, by destroying the lease, to destroy the estate under it, substituting some other arrangement for it, and in the absence of that other arrangement I should hold the old one binding. If I am right as to the application of the Statute of Frauds, the plaintiff might enforce the right of purchase personally against the defendant. If I am wrong, I would hold on the evidence the refusal of the defendant a fraud against which a court of equity should give redress. The defendant's counsel have insisted that the lease, not naming assignees, was valid only as to Morrissey. I think any assignee of his could enforce it, terms going to assignees unless expressly excluded—*Williams on Conveyancing*, 9th edition, 319. All chattel interests pass to executor—See *Williams on Executors*, 670, and subsequent cases. But the defendant has afforded some evidence against her in accepting the receipt for rent without objecting, and more materially in swearing to the statement of assets. I think the confused nature of the property between an equity of redemption and right of re-purchase was probably the cause of it. But her having made it was probably a cause of this suit being resisted. She has brought forward another case in which I think she is wrong. She denied that Morrissey owed the defendant what she mentioned in the statement, and had actually paid him, and insists that she should be allowed credit for it against the £270. For these reasons I shall not give her her costs of suit. I shall order that upon the plaintiff, within a month, preparing a sufficient transfer to her from the defendant of the allotments 2A and 2C in bill mentioned, and paying or tendering to him £270, that he execute such transfer; if there be difficulty, that he effectually convey the said allotments to her so that she may have a certificate of title clear from any encumbrances which he may have created under the Act 301, and that the chief clerk of the Court may direct all necessary acts to be done, and the defendant do them at his own expense, the plaintiff paying only her costs of preparing the transfer and the registration of it. The proceedings to be continued under the Judicature Act.

Oct. 21.

THE SHIRE OF BALLAN v. THE QUEEN.

Injunction—No application lies against the Crown to prevent the issue of a licence inconsistent with the rights of a former lessee—When proceedings to be taken.

Motion for an injunction to restrain the Board of Land and Works, the Mining Department, and the servants and agents of Her Majesty from granting a licence to Alex. Mills to cut a race for mining purposes from the Lerderderg Creek, for the purpose of diverting water from the creek.

DR. MADDEN and MR. TOPP appeared for the petitioners in support of the application; MR. WEBB, Q.C., and MR. WORTHINGTON for the respondent.

The petition stated that on 1st January, 1864, the Crown granted to the district board and ratepayers of Ballan a lease of a water reservoir known as the Blackwood reservoir, in the district of Ballan, together with the exclusive right of collecting the storm water falling upon that piece of land, or on part thereof on which the reservoir stands. The petitioners are the legitimate successors in title to the Ballan District Road Board. The lease gave to the lessees power to cut and construct and use all such storm-water channels, races, pipes, flumes, drains, embankments, levels, and other works on the land which might be necessary for conducting the water gathered therein and thereon into the reservoir. The lease was to be for 99 years, and the petitioners were to use the land for the purpose of gathering and collecting the storm water. The rent was to be £1 per annum. The lease was still in operation. The petitioners alleged that one Alex. Mills had made application under the Mining Statute and the regulations thereunder for a licence to cut a race for mining purposes from the Lerderderg Creek, on the south of the Dividing Range, about four miles from Blackwood, which creek was within the area granted by the lease to the petitioners. The petitioners lodged objections to the issue of the licence to Mr. Mills in accordance with the regulations. An inquiry was held before Warden Shuter, who recommended that the licence should be granted. On the 29th August, a notice appeared in the *Government Gazette*, stating that after the expiration of one month from the date thereof it was intended to grant the licence for 10 years to Mr. Mills, as on behalf of the Simmons' Reef Amalgamated Mining Company, No Liability. The petitioners contended that under the lease they had the exclusive right of collecting the stormwater, and that if the licence was granted to Mr. Mills, it would be an interference with their rights.

HIS HONOR, in giving judgment, said that the Crown had granted to the petitioners a lease of a water reservoir at Ballan. The petitioners, by the lease, had a right to the water in the reservoir, and had the power of selling it to parties who might desire to purchase it. After this the Crown purported to grant to a mining company to cut a race for mining purposes, and to take away the water from the watershed which had previously been leased to the petitioners. This petition was filed to prevent the issue of the licence. The case came within a decision of his, *The City of Melbourne Mining Company v. The Queen* (4 W. W. & A'B.), in which he held that no application would lie against the Crown to prevent the issue of a lease inconsistent with the rights of a former lessee or owner, and that proceedings could not be taken if something was not actually done. He did not see any

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difference between a lease and a licence as in this suit. The proceedings by the petitioners were premature till a licence had been actually issued and something had been done by some one which would be an infringement of the alleged rights of the Ballan Shire Council with regard to the reservoir in question. He would therefore refuse this application. Costs to be costs in the cause.

(Before His Honor Mr. Justice Higinbotham.)

JELL V. BRADSHAW. Oct. 29.

Landlord and tenant—Rent—Eviction by a landlord, in order to operate as a suspension of the rent, must amount to the expulsion or amotion of the tenant—A trespass by the lessor will be no suspension of the rent—What is eviction.

This was an action by Joseph Jell against Joseph Bradshaw, to recover a sum of £68 for rent of premises at Mulgrave. The defendant disputed his liability to pay, and put in a counter-claim for damages he had sustained in consequence of having been evicted from the place before the expiration of his tenancy.

MR. ISAACS for the plaintiff; MR. HOOD for the defendant.

HIS HONOR, in giving judgment, said that the plaintiff claimed in this action a sum of £60 for one year's rent of land at Mulgrave let to the defendant. The agreement was dated 6th August, 1883, and by it the plaintiff agreed to let, and the defendant agreed to rent, "300 acres of Bushy-park, J. Jell's pre-emptive right, for one year, at the rate of £60 per year, for grazing." The plaintiff's property in Bushy-park contained according to the Government plan 320 acres, and according to measurement upwards of 333 acres. There were two houses upon it, one enclosed in a garden of an acre and a quarter, in which the plaintiff was living at the date of the agreement, and in which he had since continued to live. The key of the other house, which was empty, was given by plaintiff to the defendant's brother about a fortnight after the date of the agreement. It was afterwards occasionally occupied during their visits by the defendant and his friends. The plaintiff further claimed a sum of £8 for 16 weeks' rent of this house at 10s. per week, ending December 8, 1883, as upon a distinct agreement with the defendant. The terms of the agreement of August 6, 1883, which were drawn up by the defendant, did not specify what portion of Bushy-park was included in the lease, or whether either or both of the houses in the park were to be let to the defendant. It did not appear that the parties came to a distinct definite understanding on the subject. It was not necessary, as he regarded the evidence, to determine that point, but he was inclined to think that the words "for grazing" in the agreement must be taken not only to define the nature of the occupation, but also to limit the area of the leased land to that portion of it outside the house and garden. The agreement had not been objected to as being void for uncertainty. The defendant resisted both claims of the plaintiff, and also set up a counter-claim for damages, on the single ground that he had been evicted by the plaintiff during the term and before the rent became due. Eviction by a landlord, in order to operate as a suspension of the rent, must amount to the expulsion or amotion of the tenant. A trespass by the lessor will be no suspension of the rent (*per* Mr. Justice Williams in 1 *Williams v. Saunders*, 208, note 2). Eviction was an amotion of a permanent character done by the landlord in order to deprive, and which had the effect of depriving the tenant of the use of the thing demised or of part of it (*per* Mr. Justice Willes in *Upton v. Townend*, 17 C. B. 72). In the present case the alleged eviction consisted in a notice in the following terms, sent by the plaintiff to the defendant:—"Mr. Joseph Bradshaw,—I hereby give you notice to deliver up possession of my house by this day week. 1st December, 1883. J. JELL." The plaintiff received the key of the house about a fortnight after the 1st December, after the defendant had voluntarily removed his cattle from the land. The plaintiff had not, in his opinion, evicted the defendant. If the agreement for letting included the house the notice to quit was only an empty threat which the defendant might have disregarded, and which could not have been put in force by the plaintiff. If, on the other hand, the parties did not intend to include the house in the lease of the 300 acres, the notice to quit was limited in its terms only to the house, and there was nothing to indicate that the plaintiff desired to disturb the defendant as a tenant in the enjoyment of the land leased to him for grazing. After the evidence was closed, the defendant's counsel desired to amend the pleadings, so as to set up a defence of surrender. Such an amendment at that stage, would he thought, be unprecedented, and would alter the whole nature of the case made by the defendant. Further, the facts proved would be equally inconsistent with a surrender of the lease as with an eviction, for whatever might have been the wishes or intention of the defendant, the plaintiff did not appear to have desired to put an end to the lease, unless the defendant carried out a proposal he made to buy the land. The amendment, therefore, ought not to be allowed, and as the defence of eviction had failed, the plaintiff was entitled to recover a year's rent. The counter-claim made by the defendant for damages he sustained by the eviction would be disallowed. The plaintiff also made a claim for £8, for rent, for the use of the house, but that claim had not been proved, and would be disallowed. He would direct that judgment be entered for the plaintiff for £60.

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(Before His Honor Mr. Justice Molesworth.)

SUMNER v. SUMNER AND OTHERS. Oct. 30.

Will—Bequests to trustees of property "to be employed in such charitable purposes as the trustees shall in their absolute discretion think fit" is not void from uncertainty.

This was a suit by the children of the late Mr. T. J. Sumner against the executrix and executors of their father's will, in which the opinion of the Court was sought as to a portion of the will. Mr. Sumner died on the 20th April, 1884. By his will, dated 31st March, 1884, he appointed the defendant Sarah Jane Sumner his executrix, and Messrs James Grice and J. W. Eggleston (also defendants) his executors. The will made certain provisions as to the distribution of the greater part of his property. But as to three-tenths of it, he directed that a portion should be applied in payment of certain annuities and legacies, "the balance to be employed in such charitable purposes as my said trustees shall in their absolute discretion think fit." The plaintiffs instituted the suit, contending that the bequest to "charitable purposes" was void from uncertainty, and that Mr. Sumner had, as to this property, which was said to be worth £80,000, died intestate, and that the property should be divided among the next of kin. The trustees contended that a valid charitable trust had been created by the will, and that his next of kin were not entitled to the balance. The Attorney-General was made a defendant to the suit as representing the public, and he also contended that the gift for charitable purposes was good.

MR. WEBB, Q.C., MR. A'BECKETT, MR. HODGES, and MR. HIGGINS appeared for the plaintiffs; MR. WORTHINGTON for the Attorney-General; MR. GREGORY and MR. NEIGHBOUR for the executrix and executors.

HIS HONOR, in giving judgment, said,—Mr. Sumner directed that three-tenths of his residuary estate should be disposed by the words "in such charitable purposes as the said trustees should in their absolute discretion think fit." A suit has been instituted on behalf of his next of kin to have a declaration that no valid trust has been created as to this three-tenths, and that it belongs to them. The executors and the Attorney-General have opposed this, and insist that the trust is good, and should be executed. I have been referred to cases in which such trusts at discretion of executors have been held bad, but in all the testator describing the objects has used words which might include some not charitable. *Kendall v. Granger*, 5 Hare, 300; *Williams v. Kirhead*, 5 Cl. and Fin., "benevolent purposes." So *James v. Allen*, 3 Meivale 17; *Jarmin's Estate*, 8 Ch. D., 584; *Ellis v. Selby*, 7 Simons 352, 1 Milne and Craig, 286, "charit able or other purposes." In *O'Manney v. Butcher* (Turner and Russell 260), a residue was directed to be applied generally to private charity. The Master of the Rolls held this to be indefinite, and therefore not to be executed. I have tried to find what private charity means, and failed. In *Morice v. Durham* (9 Vesey 399, 10 *id.* 522), a fund was left for such objects of benevolence and liberality as the trustee or bishop should in his own discretion most approve. It was held not a good trust, because benevolence is not tantamount to charity. As to trustees applying a fund, we may say in giving "£10 to an institution for poor blind men," or in giving "200 shillings to 200 poor blind men"—as far as I can collect the distinction between public and private charity by Sir Thomas Plumer, Master of the Rolls, in *O'Manney v. Butcher*, he would hold the former a good and the latter a bad trust, as the Court could not see the execution of it. This, then, would be judge made law that the inconvenience of control by the Court would make a trust illegal. The sum in question there was small. The decision was referred to in *Horde v. Suffolk* (2 M. & K. 59), where annual sums were bequeathed to a person to be distributed in charity, at the discretion of the legatee, either to private individuals or public institutions. Sir John Leach, Master of the Rolls, held that the legacies did not fail. But in some cases and books *O'Manney v. Butcher* seems to have been approved (*Nash v. Morley*, 5 Beav. 177) verbally, but in effect, the objects being clearly poor persons, the trust was sustained. The expression in this will, "absolute discretion," has always been broken through. The ingenious argument presented to me for the plaintiffs is, a trust fails if any of its objects fail. A private charity would be an illegal object, and yet would come under the description "charitable purposes." In *Morice v. Durham*, above referred to at 10 Vesey, 541, Lord Eldon clearly held that where there was a clear disposition to charity it should be executed either by the Court or the Crown. There is in the case before me a clear direction to apply to charity. If the Court should hold that an application to purposes of private charity, whatever that may mean, is illegal, it should prohibit the trustees from making such, not defeat the trust altogether. I dismiss the bill, the plaintiffs to pay the costs of the Attorney-General.

Oct. 30.

THE TRUSTEES, EXECUTORS, AND AGENCY COMPANY v. FOY.

Will—Where the testator directed that the residue of his property should be equally divided between his wife and son, but in the event of the wife marrying again that her share should be paid to his son, Held, *that the widow was entitled to the income of a moiety during widowhood.*

This was a suit instituted by the plaintiffs as executors of the will of the late Mark Foy, of Collingwood, to obtain the opinion of the Court as to the meaning to be attached to a portion of Mr. Foy's will. Mr. Foy died in January last. By

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his will he appointed his wife and the Trustees, Executors, and Agency Company to be the executrix and the executors of his will. He directed that after payment of certain legacies the residue of his property, amounting to about £15,000, should be equally divided between his wife and his infant son, Maximilian John Foy, his other children by a previous marriage having been provided for. He also directed that, in the event of his wife marrying again, the share of the property that he bequeathed to her should be paid to his son, Maximilian John Foy. The widow renounced probate of the will and of any trusts conferred on her by it, and probate was granted to the Trustees, Executors, and Agency Company. The question was whether Mrs. Foy was entitled to be paid half of the estate, or whether she should receive only a life interest in it.

MR. HIGGINS for the plaintiffs, DR. M'INERNEY for Mrs. Foy; MR. CAMPBELL for the infant son of the testator.

HIS HONOR said,—Mr. Foy made a will by which he left all the residue of his estate, real and personal, to his wife Catherine, in trust for herself and their son Maximilian John Foy, share and share alike, provided, however, that if after his decease she should again marry he revoked the foregoing devise and bequest, and devised and bequeathed to his son Maximilian John all the said residue of his estate; and he appointed his wife and the Trustees, Executors, and Agency Company his executors. The wife filed a disclaimer, stating that she had never accepted the trusts, and refused to accept them, and disclaimed all right and title to the probate of the will, and all the trusts and powers and discretions thereby reposed in her. The plaintiff company alone obtained probate, and brought this action for instructions and directions. The disclaimer does not deprive the wife of any beneficial interest under the will. There is no doubt that the provision for the cesser of her interest upon her marriage is effectual, although in restraint of marriage. If she took as a trustee under the will it would be for herself and infant so equally, whether as joint tenants or tenants in common might be doubtful. Upon her marriage, at all events in the son's lifetime, it would totally cease. But I think her entitled to the income of a moiety during widowhood. The son will be entitled to the other moiety, and I shall direct a sufficient allowance to be made for his maintenance, education, and clothing, the residue of his moiety to be accumulated on real or Government security during his infancy. I shall refer to the chief clerk to take the usual accounts, to ascertain the residue, and direct the plaintiff company as trustee to invest the uninvested residue upon Government or real securities, and to pay a moiety of the clear income to the defendant, Catherine Foy, so long as she remains unmarried, the other moiety as above directed. I refer to the chief clerk to fix from time to time a sufficient allowance for the maintenance, clothing and education of the defendant, Maximilian John Foy during his infancy, to be paid to the defendant, Catherine Foy, as his guardian, if she wishes for that office, a separate account to be kept by the plaintiff of the accumulated fund. I direct the costs of all parties to be taxed by the taxing officer, as between solicitor and client, on the higher scale, and retained or paid by the plaintiff out of the residue. The events of the death of either the widow or son, or the marriage of the former, will make further directions necessary.

Re THOMAS M'NAMARA. Oct. 31.

Insolvency Statute 1871 (*No.* 379), *sec.* 37—*A secured creditor who denies the fact of holding a security cannot petition for sequestration—A secured creditor who petitions for sequestration is bound to give up his security at the price he puts upon it.*

Rule *nisi* for the sequestration of the estate of Thomas M'Namara, laborer.

MR. WEBB, Q.C., and MR. ISAACS moved the rule absolute; MR. DUFFY showed cause.

The petitioning creditors were Mr. Fraser, plumber, and Mr. Strongman, solicitor, and the ground on which the application was made was that the respondent had not satisfied two judgments obtained by the creditors.

HIS HONOR said Messrs. Strongman and Fraser presented a petition for the sequestration of the estate of Mr. M'Namara, stating debts due to them separately amounted to more than £50 on judgments, executions issued, and demand of payment not complied with. The petition and the affidavits verifying it stated that their debts respectively were wholly unsecured. In fact, Strongman held a security for his debt, and rule *nisi* was obtained, stating that the debts were unsecured. The respondent duly served notice of objections, amongst others that Strongman's debt was secured. The petitioner sought to remedy this mistake by serving notice that Strongman was ready to give an estimate of the value of his security in land described, and estimated it at 1s., and claiming to be a creditor for the previous amount less a shilling, and offering after adjudication to give up the security to the assignee. There was no offer to pay costs. The security was but of trifling value. At the hearing before me some ground was shown for disputing the debt to Fraser, but I was disposed to hold the objection not disclosing security fatal. The section 31 of our act would not apply, as the petition was all right. I have always held the provisions of our act as to valuing, security, or offering to give up, very important. The unsecured debt must be over £50, and in this case its amount as to being so was questionable. It is important also that the petitioner should be conclusively bound to give up his security at the price he puts upon it. Counsel for the peti-

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tioners sought to meet this objection by the notice served, valuing and offering to give up, and relied upon a decision of the Master of the Rolls in England, in *re Vanderluder*, 20 L. R. Ch. 289. In it it was held that the petitioner stating that there was no security might be cured by a letter before the hearing of the petition, stating that the petition was not valued at anything, and at the hearing offering to give up. The words of the English Act 32 and 33 Vict., 74, as to the contents of petition correspond with our Act 379, section 37; but our practice, as orders *nisi* and effect of them, and the manner of proceeding, joining issue upon facts, and trial of them, and amending defects, is totally different from what the English practice at the date of the case referred to was, and the Master of the Rolls referred to English rules which we have not. Uniformly, since the Act 379, I have held the false denial of security to be a fatal objection. I discharge the rule *nisi* with costs.

BUTCHER V. MARTIN. Oct. 31.

Administration suit—Executors not filing accounts within the prescribed time and allowing one of their number to manage the estate without interference—Costs.

This was a suit for the administration of the estate of one James Butcher, late of Beeac. The defendants were Wm. Martin and Charles Buchanan, the surviving executors of Butcher's will. It was alleged by the plaintiffs that the defendants had allowed another executor, Mr. R. Robertson, since deceased, to manage the estate without any interference by them, that he had mixed up the moneys of the estate with his own moneys, and that, as accounts had not been furnished, it was necessary to institute the suit. The accounts had been taken, and it was found that there was a sum of £106 due to the executors on a portion of the accounts. A sum of £96 was claimed by a solicitor of the executors, who held deeds of some property as security. It was agreed that the executors should pay that amount, and should hand over the deeds to the plaintiffs. It was also agreed that the executors should be paid the sum of £106 by the plaintiffs. The only question in dispute was as to costs. It was contended by Mr. A'Beckett that the costs of the executors should be paid out of the estate. No loss had been sustained, and there was no necessity for instituting the suit.

HIS HONOR said he thought the defendants should pay their own costs. They were under obligation under oath to file accounts of their dealings with the estate within 15 months after they obtained probate. They had not complied with that rule of the Court. They had also allowed another executor to manage the estate without any interference by them; and he therefore saw no reason why they should be paid their costs out of the estate. An order was then made for payment of a sum of £106 to the defendants, and for the delivery by the defendants of certain deeds to the plaintiffs, defendants to abide their own costs of suit.

IN CHAMBERS.

(Before His Honor Mr. Justice Holroyd.)

Nov. 12.

TRADERS' COMPANY LIMITED AND BROWN V. SUTTON.

Licensing Act 1876 (No. 566), sec. 62—Rules of Supreme Court 1884, Order XIV., rr. 1, 4—Where an application is made to sign final judgment on the ground that there is no defence to the action the plaintiff has to show that the money is owed legally. If the defendant does not appear on such application the plaintiff has to show that there is no defence. Liberty given to plaintiff on such application to sign judgment for a portion of the claim which is not in dispute.

Application under Order XIV., r. 1., on behalf of the plaintiffs for an order that the plaintiffs be at liberty to sign final judgment in the action for the amount endorsed on the writ of summons with interest and costs, on the ground that there is no defence to the action.

MR. BOX for the plaintiff: The affidavit of Brown, one of the plaintiffs, shows that he is the manager and licensee of the Oriental Hotel for the plaintiff company; that the defendant is justly indebted to the plaintiff company in the sum of £138 odd for board and lodging and wine and spirits supplied to him, and for £2 as interest make together the sum of £140 odd; that the defendant was a lodger in the hotel for five months, and that all the items of account in the particulars were supplied to the defendant as a lodger, and at his request and by his order. That particulars of the amount of the defendant's indebtedness were regularly rendered to him, and that he never in any way objected to any item in the account, and has frequently promised to pay the amount due. That the defendant, while a lodger, did pay the sum of £40 on account of the amount then due by him. That the plaintiff company sued the defendant in the County Court, and was nonsuited on the ground that no person but the licensee of the hotel could sue. That the sum of £140 odd is wholly due and unpaid, and that there is no defence to the action. The defendant by his affidavit states that £22 odd of the amount claimed is for board and lodging, which the plaintiff company is entitled to recover, but that the balance of the amount claimed is for wine and spirits which they cannot recover as they are unlicensed persons.

MR. DUFFY, for the defendant: There has been no written demand for interest so that the plaintiffs cannot recover that item. The plaintiff company can only sue for board and lodging, which we admit to be due. They cannot sue for wines and spirits as they are not licensed. If the plaintiff

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company were in a position to sue for wines and spirits they have not shown under what circumstances the wines and spirits were supplied. Section 62 of the Licensing Act provides that a licensed person can only recover the value of liquors supplied at meals to lodgers. The onus of proof lies on the plaintiffs to show that the liquor, the price of which is here sought to be recovered, was so supplied.

His Honor said: As there has been no written demand for interest, the plaintiffs cannot recover it. The plaintiff, Brown, is the servant of the plaintiff company, and I am of opinion that the plaintiff company can carry on business by its servant, who is licensed. The plaintiff, Brown, sells himself as the agent for the plaintiff company. Although I am not to suppose that a man has done anything illegal, I am not bound to assume that all the liquor has been supplied at meals when it is legal to supply liquor at other times. The plaintiff has to show that the money is owed legally. If the defendant did not appear at all the plaintiff would have to satisfy the judge that the defendant had no defence before he would be allowed to sign final judgment. It appears that if every word to the plaintiffs' affidavit be true, yet that they may not be entitled to the whole amount. The plaintiffs may, under Order XIV., rule 4, if they so wish, sign final judgment for the amount of the board and lodging which is not in dispute.

Mr. Box asked that the matter should be adjourned to enable the plaintiffs to file an affidavit showing how much of the liquor was supplied at meals.

His Honor said: I will allow the matter to be adjourned for three days to allow the affidavit to be filed. The defendant, will, of course, be at liberty to file answer affidavits if he should think it necessary.

(Before His Honor Mr. Justice Higinbotham.)

Nov. 13.

Nixon v. Milton and Others.

Rules of Supreme Court 1884, *Order XXX., r.* 3; *Order XXXI., rr.* 1, 26—*Leave to deliver interrogatories—Copies of proposed interrogatories need not be served upon the party sought to be interrogated—Application for leave to deliver interrogatories ought to be included in and made upon a general summons for directions—Where application is made on a special summons it should be made* ex parte—*The judge should satisfy himself as to the nature of the action, the issues involved, the general scope of the proposed interrogatories, and as to any offer to deliver particulars or to make admissions that interrogatories ought to be administered.*

Summons on behalf of the plaintiff, calling upon the defendants to show cause why leave should not be granted to deliver interrogatories.

Mr. Pirani for the application.

His Honor said: This is a summons for leave to deliver interrogatories. Copies of the proposed interrogatories were not served on the defendants, who have appeared by different attorneys. I have been referred to the case of *Hall v. Liardet*, W. N., November 10, 1883, p. 165, in which it was held that copies of the proposed interrogatories need not be served upon the parties whom it is sought to interrogate. I concur with that view of the Rules under Order XXXI. relating to interrogatories, but think that it follows as a consequence of that view that, except when it is otherwise ordered, the application for leave should be *ex parte*, and that the party to be interrogated, who has no knowledge of the proposed interrogatories ought not to be summoned. He cannot be called upon to answer the interrogatories until they are delivered, and until security has been paid in (Order XXXI., r. 26), and before delivery he is not in a position to object to the interrogatories or to move to set them aside, (rules 6 and 7 on the same order.) It has been properly stated, I think, to be the intention of these rules that when leave is applied for, the judge should satisfy himself by inquiries as to the nature of the action, the issues involved, the general scope of the proposed interrogatories, and as to any offer that may have been made by the parties sought to be interrrogated to deliver particulars, or to make admissions, or to produce documents, that interrogatories ought to be administered, leaving it to the party interrogated to raise special objections if he thinks fit. Generally speaking, an application under rule 1 of Order XXXI. is an application that can and ought to be included in and made upon a general summons for directions (Order XXX., r. 3), and when it is not so made the costs must fall upon the party applying for leave. It is his interest, therefore, and I think it is his right, to make the application *exparte*, where a general summons for directions is not taken out. In this case the plaintiff can have leave to deliver the interrogatories proposed, but he must pay the costs of the defendants who have appeared on the summons.

Solicitors for plaintiff, *Braham* and *Pirani*.

Nov. 14.

The Colonial Bank of Australasia v. M'Leod.

Set aside judgment—Guarantee—Forgery—Judgment regularly entered upon a guarantee set aside when the defence is forgery of the instrument, and where the reason for not defending the action was the defendant's mistaken idea that he had not been served with the writ of summons—Costs.

Application on behalf of the defendant calling upon the plaintiffs to show cause why the judgment and all other proceedings in this action should not be set aside, and why the defendant should not be at liberty to appear and defend this action.

The defendant's affidavit in support of the application stated that the writ of summons was issued on the 19th May, 1884, and was served on the 21st May, and that judgment was signed on the 6th

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June, 1884; that the action was brought on a guarantee alleged to be signed by him to pay the plaintiffs on demand any amount, not exceeding £500, which they might advance to Gregory and Co., with interest; that a person called at his farm on the 21st May, and offered him the summons, but as he was almost blind, he asked that person to read it to him, and that when it had been read he would not take it, as he had not signed any guarantee, and did not owe any money to the plaintiffs; that the person then threw the writ of summons down, and that he (the defendant) left it lying there, and did not know what became of it that he did not take it in his hands because he thought that if he did not do so nothing could be done against him, but if he had been aware that such service was good he would have taken the paper and defended the action; that he heard about the middle of August, 1884, that his property was advertised for sale by the sheriff, and on making inquiry of his solicitor he discovered that the plaintiffs had on the 6th June, 1884, signed judgment against him for the sum of £652 odd, being the amount alleged to be guaranteed and interest and costs, and that the property was to be sold under a *fi. fa.* issued on the 18th June, 1884; that the plaintiffs bought the property at auction for £3 3s., but that he valued it at £1200; that he never signed his name to a guarantee for Gregory and Co. for any sum; and that if his name appears on the guarantee sued on it is a forgery; that the only dealings he had with Gregory and Co. was giving them a promissory note for £7, and by that means Gregory and Co. had his signature, and that this promissory note was given by him about the date of the alleged guarantee. That he had a good defence on the merits, and that the delay had been through his inability to obtain means wherewith to pay the costs of moving in this matter, and the probability that he would have to pay plaintiffs' cost of the proceedings herein if the proceedings were set aside and leave given to appear to and defend the action. That he has lodged a caveat against the further dealing with the land by the plaintiffs, pending the result of the application.

The affidavit on behalf of the plaintiffs states that the defendant's land was and still is subject to a mortgage of £400 and interest thereon in favor of a third party; that the sale of the defendant's land was duly advertised prior to the date of the sale, and that the defendant's interest in the land has vested in the plaintiffs, who now hold the certificate of title thereto.

It was submitted on behalf of the plaintiff that the defendant had a good case on the merits; that where the service of the writ was regular as in this case, and the judgment regularly entered, leave can be given to set the judgment aside on terms (*Atwood v. Chichester*, 3. Q. B. D. 722). Lapse of time is no bar where no irreparable wrong is done (*Willet v. Atterton*, 1. Wm. Bl. 35; *Disted v. Lee*, 1. Salk: R. 402).

DR. MADDEN for the plaintiffs: No doubt a judge has a discretion in a case like the present, but it ought not to be exercised here. Not only was the writ served upon the defendant but it was read over to him. In the middle of August defendant went to his solicitor and found that the property was advertised for sale. He went to the solicitor to discover whether the service of the writ was good. The defendant although he knew that the service was good, and that the land was to be sold, did nothing. The land was sold by the sheriff, and a certificate of title was issued to the plaintiffs. The setting aside the judgment would be of no use to the defendant as a certificate of title has been issued. A judge has no jurisdiction to set aside a title. The defendant's only remedy, if any, would be against the "Indemnity Fund." There must be some deception or fraud to enable a judge to set aside a certificate of title. The plaintiffs have lost two opportunities of trial so that, if leave be granted to the defendant, he should bring the amount of the judgment into Court.

HIS HONOR said: I think this is a case peculiarly proper to enable the defendant to raise this defence. I will exercise the power which I am glad to say I think I possess, and will grant the application. I order that the summons be allowed; defendant to be at liberty to appear to and defend the action on payment of the costs of the action and execution, and of this application. The defendant to take such notice of trial as the plaintiff can give. I make no mention of the payment into Court of any amount by the defendant. I certify for counsel.

Solicitors: For plaintiffs, *Moule* and *Seddon*; for defendant, *Kidston*.

GRAHAM v. MOYLAN. Nov. 14.

Set aside judgment—Order nisi *for a new trial granted to plaintiff on the ground of misdirection —Judgment signed by the defendant after the grant of the order and before it is issued—An order* nisi *must be issued within a reasonable time —Where one party knows that an order* nisi *has been obtained he ought not to sign judgment without communicating with the party who has obtained the order.*

Application on behalf of the plaintiff calling upon the defendant to show cause why the judgment entered up in this cause should not be set aside, and the Prothonotary ordered to issue the rule *nisi* granted herein, on the ground that there was no unnecessary delay in taking out the rule *nisi* for a new trial.

MR. EVANS, for the plaintiff: The affidavit filed by me in support of the application states that an order *nisi* for a new trial was granted by the Full Court in this case on behalf of the plaintiff on Friday, the 7th November, on the grounds of

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misdirection by the learned judge who presided at the hearing. That I was not aware till the next day (Saturday) that the rule had been granted. That the following Monday was a public holiday. That I drafted the rule to submit to counsel at his request, but was unable to see him until the Wednesday morning, although I endeavored to to do so. That I attended at the Prothonotary's office on Wednesday morning for the purpose of issuing the rule *nisi*, and found that judgment had been entered up on behalf of the defendant. That the Prothonotary has refused to issue the rule *nisi*. There was no unnecessary delay in issuing the rule *nisi*.

It was contended, on behalf of the defendant, that there had been delay in issuing the rule *nisi*. That this was a matter under the old procedure. That there was no rule as to what time a rule *nisi* should be issued, but that it must be issued within a reasonable time, which had not been done in this case.

In answer to a question from His Honor, it was admitted that the defendant knew that the rule *nisi* had been granted.

His Honor said: As there is no rule prescribing a time within which a rule *nisi* should be issued, it must be done within a reasonable time. I do not think that under the circumstances the time was unreasonable in this case. I think that as the defendant knew that the order had been obtained, that he ought to have communicated with the plaintiff before signing judgment. I grant the application without costs.

Solicitors: For plaintiff, *Evans*; for defendant, *M'Kean* and *Leonard*.

(Before His Honor Mr. Justice Williams.)

Byrne v. Lewis. Nov. 3.

Rules of Supreme Court 1884, *Order LXV., r.* 6—*Slander—Justification—Costs on the higher scale allowed although the verdict is for a lesser sum than* £50, *where in an action for slander the defendant has pleaded but has failed to prove justification.*

Summons under Order LXV., r. 6, on behalf of the plaintiff calling upon the defendant to show cause why the costs of and incidental to the action should not be taxed on the higher scale.

The action was one of slander. The defendant made statements accusing the plaintiff of having embezzled the funds of the Moyher Race Club.

The defendant, among others, pleaded justification. The plaintiff had been treasurer of the race club, and some twelve months after he resigned that position it was discovered from an entry in the books in his own writing that he had a sum of money in his hands when he resigned, which he had not paid. On the fact being shown to the plaintiff he immediately paid over the money.

At the trial the judge held that the plea of justification was not proved, and a jury gave a verdict for the plaintiff, with £5 damages.

Mr. C. A. Smyth, for the the plaintiff, applied under Order LXV. for a certificate for costs on the higher scale.

Mr. Skinner, for the defendant, opposed the application.

His Honor said: I order that the higher scale of fees shall apply in this action on taxation between party and party. Each party to bear their own costs of this application. If the defendant had not pleaded and attempted to prove a plea of justification to the effect that the plaintiff committed embezzlement, I would not have made the order. Apart from the plea of justification, the action might have been brought in the County Court. Rule 8 of Order LXV. does not apply. I make the order under the proviso to Rule 6.

Solicitors: For plaintiff, *Tuthill* and *Dickson*; for defendant, *Coster*.

Probate Jurisdiction.

(Before His Honor Mr. Justice Molesworth.)

In the Will of Payne. Nov. 13.

Trustees, Executors, and Agency Act 1879 (*No.* 644), *secs.* 1, 2—*Administration* de bonis non cum testamento annexo—*Where a person who would be entitled to take out administration resides within the jurisdiction of the Court he cannot, by his consent, substitute the Trustees, Executors, and Agency Company or any other person for himself.*

In this case Mr. Worthington had applied for administration, with the will annexed, of Wm. Payne to be granted to the Trustees, Executors, and Agency Company.

His Honor said: Mr. William Payne died in 1880, and probate of his will was granted to his widow, who died intestate in September last. An application is now made by the Trustees, Executors, and Agency Company Limited for administration *de bonis non cum testamento annexo*. With the concurrence of the infant son of the deceased and of the nearest relatives, the incorporated company procured a private act of Parliament, No. 644, section 1 of which authorises the testator to appoint the company executors. Section 2 says:—"In all cases and in like circumstances in which a private individual may apply for and obtain letters of administration with the will annexed of the estate of a deceased person, it shall be lawful for the said company to apply for and obtain letters of administration with the will annexed, and the said company shall be entitled to perform and discharge all the acts and duties of an administrator as fully and effectually as a private individual may do to whom letters of administration are granted." There are cases in which, by the practice of the Court, individuals may nominate others to be administrators almost as a matter of course—executors out of the jurisdiction by power of attorney, &c., and

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I have in such cases held the company in question so nominated as administrator to be eligible. But the present application seeks to go much further, and to go to this, that persons here who would be appointed administrators may substitute this company for themselves. If an individual similarly recommended applied to me I would refuse, leaving it to the persons recommending or any other eligible individual to apply.

Nov. 13.

IN THE WILL AND CODICILS OF LEVEY.

Probate—Renunciation of executor abroad—The renunciation by an executor of the trusts of a will in another colony does not affect proceedings for probate in this colony—Probate will only be granted in this colony reserving leave to him to come in and prove.

Application by George Moses Alexander, one of the executors under the will of the testator, for probate of an exemplified copy of the will and codicils of Montague Levey deceased, of Sydney, New South Wales, reserving leave to Victor Cohen, another executor, and Catherine Levey, the executrix, to come in and prove. The testator died in Sydney, and probate was granted to the applicant Cohen, and the widow; the other executor, David Marks, having renounced.

MR. WEIGALL for the application: The advertisement is for probate to the applicant with leave reserved to Cohen and the widow to come in and prove. The other executor, Marks, is left out. As your Honor has previously decided that you are not bound by the renunciation of an executor in another colony (*In the Will of Wherrett*, 9 V. L. R., 25 I. P. M. C.) I ask for probate to the applicant, with leave reserved to Cohen, Marks and the widow to come in and prove.

HIS HONOR: I will grant the application, leave being reserved to Marks to come in and prove with the others.

Proctors, *Briggs* and *Snowball*.

IN THE WILL OF COOK. Nov. 13

Regulæ Generales, 23*rd June*, 1873, *r.* 4—*Probate—Affidavit of executors as to the residence of the witnesses to a will—Affidavit stating that the will was executed in the presence of G. M., of C., solicitor, and S. M., "his clerk," is not sufficient.*

Application for probate to the executors. The affidavit stated that the will was executed in the presence of George Merrifield, of Castlemaine, solicitor, and Samuel Henderson Miller, "his clerk." The registrar took the objection that the residence of the second witness was not stated.

MR. ANDERSON, for the application, submitted that this was a sufficient compliance with the rule. The affidavit states that the witness is the clerk of George Merrifield of Castlemaine, and consequently he will be taken to be of Castlemaine even though he sleeps elsewhere (*Attenborough v. Thompson*, 2 H. & N. 559).

HIS HONOR said: There is no doubt an analogy between the case cited and this one; but as the rules require the residence of both witnesses to be set out I have always required it to be done. I will require an affidavit as to the residence of the second witness.

Proctors, *Lynch* and *M'Donald*.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Molesworth.)

HODGSON V. YOUNG. Nov. 12.

Sequestration—Release—Mortgage—A mortgagor's insolvency and the subsequent release of her estate from insolvency does not prevent the mortgagee from claiming the amount due to him on his security.

This suit came before the Court on exceptions to the master's report, and for further directions. The plaintiff, Miss Frances Hodgson, sued Mr. Thomas Young and Messrs. W. T. Trollope and J. A. Wilmott to be allowed to redeem mortgages which she had given to them over some land in Collingwood and Richmond. The plaintiff alleged that the mortgages were given in the years 1871 and 1872, and that before the commencement of the suit the amounts advanced to her by way of mortgage had been paid off. In May, 1883, the Court made a decree for the taking of accounts in regard to the mortgages. Mr. Young had died since the suit was commenced. The master made a report finding that there was a sum due by the plaintiff to Young's representatives on account of the mortgage to him to the extent of £4,241, and that there was a sum of £312 due to Mr Trollope. The plaintiff excepted to the report on the ground that, as regarded Mr. Young's mortgage after it had been given the plaintiff became insolvent, viz., on 12th July, 1874. Her estate was released from sequestration in December, 1876, and it was submitted that the effect of releasing the estate was to extinguish the mortgage debt. There was another exception, that the defendant, Mr. Trollope, had been allowed interest at 10 per cent. on the amount of his debt, and that he should be entitled to only eight per cent., and it was conceded by the defendants that the interest should be only 8 per cent.

MR. GOLDSMITH appeared for the plaintiff; MR. A'BECKETT and MR. HIGGINS for the defendants.

HIS HONOR said that in reference to the exception that the debt on Young's mortgage, the fact of the plaintiff's insolvency, and the subsequent release of her estate from sequestration, did not prevent the mortgagee claiming the amount due to him on his security. He directed that the plaintiff should be allowed to redeem the properties on paying the amounts due to the mortgagees, with costs of the suit, within six months; otherwise the suit to be dismissed with costs.

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Nov. 13.

SHACKELL V. LINDSAY AND OTHERS.

Transfer of Land Statute—Mortgage—Voluntary conveyance—Notice—Costs.

This was a suit by Mr. J. Shackell as assignee of the estate of one W. P. Graham, an insolvent, to set aside certain transfers of land made by Graham as being void as against the assignee.

MR. A'BECKETT and MR. ISAACS appeared for the plaintiff; MR. HIGGINS for the defendant Lindsay; MR. FINK for the defendant Mrs. Graham; MR. DAVIDSON for the defendant Maher.

HIS HONOR, in giving judgment, said: Mr. Wm. Pedder Graham was entitled to a lease from the Crown for seven years, from November 1, 1878, of 60 acres of land at Kannyapulla, Rodney, under the Land Act of 1869. He executed an assignment of it on November 29, 1879, to Mr. M'Intosh as in consideration of £220. M'Intosh had become surety to a bank for Graham, and this assignment was intended as an indemnity for M'Intosh. I shall refer to it as lease No. 1. On January 1, 1882, Mrs. Bailey, Graham's mother-in-law, got a lease of about 300 acres near this for seven years under the same act, which I shall call No. 2; and on August 1, 1882, Graham got a similar lease of about 300 acres near. I shall call it No. 3. Graham had transactions with Mr. Moorhead, and appears to have deposited Nos. 2 and 3 as security with him; and Moorhead's executors, Messrs. Richardson and others, on October 19, 1882, commenced an action against Graham, claiming £1000 debt. On October 30, 1882, Graham, without any consideration, but for a nominal consideration of £320 assigned No. 3 to his wife, Mrs. Amelia Lizzie Graham, a defendant, and on the next day, Mrs. Bailey, her mother, assigned No. 2 to her, they say as a provision for her in poverty, but for a recited consideration of £320. On November 25, 1882, Mrs. Graham executed a mortgage of Nos. 2 and 3 to secure £245 to Mr. Seward. This was done with Graham's concurrence, and the debt was for advances of rent, &c., for both Nos. 2 and 3. Richardson and others, hearing something of these assignments, on December 4, 1882, lodged a caveat as to Nos 2 and 3 claiming some lien. On January 25, 1883, a defendant, Mr. Lindsay, entered into a contract with Graham and wife under seal to be his servants at wages—£70 a year, payable quarterly. This contract was prepared by Mr. Brown, an auctioneer and land agent, who appears a good deal in subsequent transactions. On January 30, 1883, Seward executed a transfer to Lindsay, as in consideration of £700, so framed that one cannot say whether it was a sale or execution of a power of sale in the mortgage to Seward. The sum actually paid, I think, was £245. The sum due to the bank by Graham was ascertained at £167 10s., and it was paid, and thereupon M'Intosh as in consideration of that sum assigned No. 1 to Lindsay. Lindsay, about January 25, 1883, became entitled to a certificate of title to Nos. 1, 2 and 3. Before that he had negotiated with Mr. Parker to lend him £700 on mortgage of them, for which they were an ample security. Lindsay does not appear to have had any property, but through these conveyances made title to the mortgages, got the mortgage money, and paid the £106 10s. and £245, and various commissions, law costs, &c. He says he got £85, the balance. The mortgage to Parker is of the same date as the agreement between Lindsay and the Grahams. The bill does not impeach it. Lindsay says that in February, 1883, he took possession; but Graham, his wife and sons remained on the land, Graham selling wheat from it—Lindsay says all, as his servants, getting wages under the contract of January 25, 1883, for which receipts prepared in Brown's office, as Brown says not by him, were passed, and this occupation has continued. Lindsay claims something as for improvements. Richardson and others got a verdict against Graham and on September 6, 1883, judgment for £621 and costs. Afterwards, on October 5, 1883, they got a rule *nisi* for compulsory sequestration, which was made absolute November 1, and the plaintiff, Mr. Shackell, was appointed official assignee. Lindsay was taking measures to sell his equity of redemption of Nos. 1, 2 and 3. On February 28, 1884, the plaintiff lodged a caveat against dealing with the lands, but Lindsay proceeded regularly, advertising a sale by Brown as auctioneer, and about March 24 the sale was had of the equity of redemption as for £887, part cash, part bills, the last bill for £575 odd, payable in March next being outstanding unpaid. The purchaser was a defendant, Mr. Maher. There was some confusion as to completing the purchase, arising from the caveat, and the bill attempted a case against Maher, charging him with notice and collusion, and some stress was laid upon the contract between Brown and Lindsay not having been acted upon. The bill for £575 was treated as if endorsed by Brown, and afterwards it appeared not to have been so endorsed, and Brown as a witness presented it as having been endorsed in order to use it in evidence. At last it was admitted that the case against Maher had failed, and that the bill against him must be dismissed with costs. A case against Lindsay is still pressed, that though the bill sought to set aside the sale to Maher, I might treat it as if it prayed to charge him with the mortgage money, £700, and the purchase money from Maher so far as the previous transactions were a fraud on Graham's creditors. The bill, sealed April 30, 1884, stated that Graham's mother-in-law, Mrs. Bailey, held the lease No. 2 as a trustee for him. (There is not, I think, sufficient evidence of that for me to act upon); that the transfer of No. 3 from Graham to his wife was wholly voluntarily

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(true); that the consideration stated for the conveyance from Mrs. Bailey to Mrs. Graham was false (true); that it was executed at the request of Graham—probable, from the manner the property was dealt with afterwards. But, on the whole, I think I must deal with it as a gift from Mrs. Bailey to Mrs. Graham in contemplation of the arrangement afterwards made as to Nos. 2 and 3. The bill further states that Graham made an arrangement with Seward by which Seward was to pretend to exercise his power of sale under the mortgage to a nominal purchaser for a nominal sum of money, but was, in fact, only to receive the amount due to him on his mortgage. I think, according to Seward's evidence, that he acted fairly, induced by Brown to execute a transfer not filled as to transferree or sum, which was filled with a false sum of £700, and Lindsay as transferree. Seward only thought of getting £245, which was due to him, and did not, I believe, know or care for whom Brown acted. He supposed he acted for Lindsay. As to M'Intosh, the bill states that he was requested to transfer not to Graham but Lindsay, but Lindsay did not pay the money. I think, according to M'Intosh's evidence, that he only thought of getting his money. He never saw Lindsay in the matter, was paid by Brown on February 6, 1883; that he was aware that Lindsay was buying, but never met him. Brown asked him to transfer to Lindsay; he had no conversation with Graham as to the dealing, but Graham had told him before that Brown was making arrangements to pay him off. The bill states the embarrassment of Graham when he made the assignment truly, and submits that the assignments from Graham and wife were void under the provisions of the Insolvent Act; that Lindsay accepted the transfers at the suggestion of Graham, and never gave any consideration for them at the time of the transfers, which I believe; and that the transfers to Lindsay were made to enable Graham to defraud his creditors, and that Lindsay should be deemed a trustee for the plaintiff. The bill prays a declaration that the transfers to Mrs. Graham were fraudulent as against the plaintiff, and also the transfers to Lindsay; that the registration of the transfers to Maher from Lindsay should be stopped, and Lindsay be ordered to transfer to the plaintiff, and be ordered to pay the £700 mortgage money. There is a good deal of discrepancy in the evidence of Lindsay and Brown. Lindsay says that he purchased the leases from Mrs. Graham, employed Brown as his agent, learned from him that the land was for sale, instructed him to buy the two back blocks, but said he would not take them unless the 60 acres mortgaged to M'Intosh were got, which adjoined the others, and were much more valuable—Brown to get the money; he did by mortgage to Parker. He says that he had no dealings with the Grahams. Brown, by his authority, paid the £300 cheques. His instructions to Brown extended to the land mortgaged to M'Intosh. He told Brown to pay M'Intosh the amount of his mortgage; he told Brown that he would give £166 for the land mortgaged to M'Intosh, £300 for that mortgaged to Seward. Brown was to mortgage the property, and pay the purchase money out of it. Brown's evidence is that he negotiated the purchase of the leases for Lindsay; that Lindsay told him that if he could get the 60 acres which M'Intosh had in his name he would buy the others, and he carried the transaction through, and arranged with Parker to raise money on mortgage to pay for the transfer of the leases for the two leases in Graham's name. £300 odd was paid. He says when he bought from M'Intosh he did not know the relations between him and Graham, and had no instructions from Graham in the matter; that all his instructions were from Lindsay; that he wanted to sell to him what he bought from Seward and M'Intosh. A series of complicated transactions commence with Graham and his mother-in-law assigning for false considerations two lots to Mrs. Graham at a time when an action was pending against Graham, as I take it, to defeat that action. There was then a mortgage to Seward from Mrs. Graham for £245, I believe a just debt of Graham's and Mrs. Bailey. Richardson's caveat stopped further dealings there. We have then Brown preparing a contract of master and servant between Lindsay and the Grahams, I think, to enable the Grahams to live on land alleged to be in Lindsay's possession. It was a stipulation for Graham's benefit, mixed with the dealings of Lindsay acquiring the land. We come then to the main dealings. Brown is employed by Lindsay, or Lindsay is advised by Brown, to purchase from really mortgagees, Seward and M'Intosh, for the debts due to them, together £467, land upon which, without the slightest difficulty, £700 was at once raised by mortgage. It was treated as a matter of course that the mortgagees, if paid their respective debts, would convey as if selling their own properties. Actual value was not talked of. The transactions would have been a fraud upon Graham or his wife if without their knowledge, for which the present plaintiff might have redress. But it was, I think, done with their full assent, and with the intent of defrauding Graham's creditors. The Transfer of Land Statute, I think, stops the plaintiff from remedy against the land, but not against Lindsay, who got the land for £467 10s., mortgaged it for £700, and in 15 months after the transaction sold the equity of redemption for £887. But as to redress to which the plaintiff is entitled, I have said that he fails as to Mrs. Bailey's land, charging Lindsay only with Graham's lands, Nos. 1 and 3, and with the proportion of the price of their 380 acres out of 700 acres, and taking the entire price, £1587, gives but £860 as the price of Nos. 1 and 3. Deducting from this £125, half the charge on Nos. 2 and 3, and £167, the charge on No. 1, paid by the transaction (£292), leaves £568,

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which I think Lindsay should be charged with as payable to the plaintiff. I am not noticing some variations in this which might be made on both sides if thought worth discussion or a difference. I shall say that upon payment of that sum to the plaintiff by Lindsay, the plaintiff should do all acts to confirm Maher and Lindsay's title, but until that is done that the registration of the transfer should be delayed. I think Lindsay should be ordered to pay plaintiff's costs of suit. He wilfully took a conveyance reciting him to have paid £700, whereas he had paid about £250. This should have disclosed to him that he was partaking in a fraud. I think the plaintiff should be ordered to pay Maher's costs of suit, and be left to abide them. As to Mrs. Graham, the plaintiff required her to answer, and has failed as to a claim on lands which had passed through her. With some doubt I think that I should order the plaintiff to pay her costs and be left to abide them. I shall defer settling my order for a week.

CONWAY v. LOUCHARD. Nov. 17.

Mining Statute 1865 (*No.* 291), *sec.* 212—*Mining Statute* (*Amendment*) 1872 (*No.* 446), *sec.* 18—*Time for notice of appeal and deposit may be enlarged by verbal consent.*

This was a special case stated by Mr. Quinlan, judge of the Court of Mines at Maryborough, for the opinion of the Court. There was a complaint before the warden by Richard Conway, seeking to have it declared that a claim held by the defendant, near Carisbrook, had been forfeited in consequence of its not having been worked. The warden decided in favor of the complainant, and directed the claim to be forfeited, but execution was stayed for 14 days. The decision was given on the 6th May, the deposit required from an appellant to entitle him to appeal was made by the defendant on the 19th May, and notice of appeal was given on the 20th May. The mining statute enacts that notice of appeal to the Court of Mines should be given within 10 days from the decision of the warden. In this case the notice of appeal was not given till 14 days after the warden's decision, but it was contended by the appellant, Louchard that there had been a consent that the notice of appeal should be given within 14 days. On behalf of the respondent, it was submitted that even if there had been a consent for the extension of time for the notice of appeal, it did not give the Court any jurisdiction to entertain it. Judge Quinlan reserved for the Supreme Court the question whether he had jurisdiction to entertain the appeal.

MR. TOPP and MR. BARRETT appeared for appellant; MR. FINLAYSON for respondent.

HIS HONOR, in giving judgment, said: I think, on the authority of *The Park Gate Iron Co. Limited v. Coates*, L. R. 5. C. P. 634, that the time for notice of appeal and deposit under the Act 291, sec. 212, and the Act 446, sec. 18, may be enlarged by verbal consent, and that according to the matters stated in the special case, the learned judge of the Court of Mines, Maryborough, might reasonably arrive at the conclusion that there was such a consent in the case of Louchard, appellant, Conway, respondent. I, therefore, think and answer, that the learned judge had jurisdiction to hear the appeal, and I order the respondent to pay the appellant's costs of the special case, and refer to taxing officer to tax.

SITTINGS IN BANCO.

(Before their Honors the Chief Justice, Mr. Justice Higinbotham and Mr. Justice Williams.)

Nov. 11.

FERGUSSON v. THE UNION STEAM NAVIGATION COMPANY.

No difference between a navigable river and a public highway—A navigable river can be used by everyone for the purposes of navigation at all times and states of the tides—If a vessel could work her way along a river she was at liberty to do so even though her keel was in the mud—Where chains by which a ferry is worked are caught and broken by a vessel lawfully using a navigable river, such chains must be considered to be an obstruction to the river.

Rule *nisi* to enter a nonsuit, or to reduce damages. The plaintiff, Mr. D. M. Fergusson, the lessee of the ferry between Sandridge and Williamstown, sued the defendants to recover £102, for damage done to chains by which the ferry was worked. The damage was done by two steamers of the defendants, the *Manapouri* and the *Hero*, in going down the Yarra on voyages to New Zealand. The plaintiff alleged that the defendants' vessels had proceeded down the river at too high a rate of speed; that they had proceeded on the voyage when the river was too low for vessels of their draught, as at the time they started the gauge in the Yarra indicated a depth of from 14ft. to 15ft. while the steamers drew 17ft. It was also said that as regarded the *Manapouri*, the damage was done owing to the peculiar formation of that steamer, it being said that there was an excrescence projecting beneath the keel which carried away the chains of the ferry. The jury, in answer to questions, found that the damage was not caused by the steamers going at too great speed, nor by a peculiar construction of the *Manapouri*. They also found that the damage was caused by the defendants' steamers going down the river at a time when there was not sufficient depth of water to take them, and that assuming that the plaintiff had a legal right to place the chains on the bed of the river it was not an obstruction to the navigation of the Yarra. On these findings a verdict was recorded for the plaintiff for £102. The nonsuit was applied for on the ground that the Yarra was a navigable river, that the defendants had a right to use it in navigation in a

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reasonable manner, that the chains were an obstruction to the river, and that no damages could be recovered for any injury done to them. The plaintiff, in reply, urged that the ferry had been established under the Local Government Act, and that by the Harbor Trust Act, sec. 56, the continuance of this ferry was sanctioned.

MR. PURVES and MR. HODGES appeared for the plaintiff; DR. MADDEN and MR. BOX for the defendants.

THE CHIEF JUSTICE said that a ferry had been constructed, which was leased to the plaintiff. It was of a peculiar kind, as to the means by which it could be taken backwards and forwards across the river. The ferry consisted of boats fastened together by chains to the bottom of the River Yarra. Vessels of the defendants in going down the river managed to take the mud at the bottom and to break the chains of the ferry. The river was a public navigable river, and all persons had a right to use it just as they would use a public highway. There was no difference between a navigable river and a public highway, and the defendants had a right to use it so long as they were using it in a reasonable manner. The ferry, it was said, was constructed under the provisions of the Local Government Act, and the plaintiff contended that it was continued under the Harbor Trust Act, and that that Act authorised a ferry of this peculiar construction. It was very unusual for Parliament to recognise a construction of this kind. But Parliament had no doubt a right to do so if it thought proper. The language of Section 50 of the Harbor Trust Act had, however, been stretched by the plaintiff to an extent which its words would not justify. That section provided that "the exclusive management and control of the port, except as hereinbefore provided, shipping, lightships, buoys, beacons, moorings, wharves, docks, piers, jetties, ferries, landing-stages, slips or platforms, lighthouses, and the preservation and improvement of the port generally, is hereby vested in the commissioners, and shall not be interfered with by any person whatsoever, save and except that the commissioners shall not close or remove any ferry without first making adequate and suitable provision in place of the same for the accommodation of the public." That section merely meant that the ferries were to be handed over to the officers of the Harbor Trust, but there were no words which would justify the conclusion that Parliament intended to recognise this ferry as having been lawfully constructed. They might use the ferry, but they must not interfere with the navigation of the river. Ships passing backwards and forwards over the river were merely using it as a public highway. It would require a very strong and clearly expressed opinion of Parliament to stop the public from using the public navigation of a river of this kind, and he thought that no such words had been used in this instance. He was of opinion that the rule for a nonsuit must be made absolute.

MR. JUSTICE HIGINBOTHAM said: I also am of opinion that a nonsuit should be entered. The declaration is founded on negligence; it contains no count in trespass. The jury had negatived two out of the three alleged acts of negligence by the defendants. They had found that the chains of the plaintiff's ferry were broken by reason of the defendants' vessels going down the river and past the ferry when they were drawing more water than there was in the navigable portion of the river at the point where the ferry was situated. And, if this act alone would be legal evidence of negligence, the plaintiff would be entitled, in the case of failure of proof of the plea of justification, to retain the verdict. The river at the point where this ferry was situated was a public navigable river, and, as such, it could be used by everyone for the purposes of navigation at all times and states of the tides (*Mayor of Colchester v. Brooke*, 7 Q. B., p. 375). This, indeed, was not disputed, nor had it been suggested that the masters of the defendants' vessels could, while exercising their right of navigation, have avoided contact with the chains of the ferry by the use of reasonable care. But it had been contended that the right of the public was limited to the water within the *alveus* of the river, and that the right of user ceased, and navigation became negligent if the bed or the semi-liquid matter forming the bed of the river was disturbed by a vessel in motion; in short, that a vessel which had not complete floatage had no right of navigation. Such a doctrine would be a dangerous infringement of an important public right. If a vessel in motion may not lawfully disturb the bed of a river, a vessel at rest cannot have the right to do so. But it had been held that the mere taking the ground by a vessel in a navigable river is not negligent navigation (*Mayor of Colchester v. Brooke*, 7 Q. B., p 375). Again, casting anchor necessarily disturbs the bed of a river. But the right to anchor unquestionably exists, and it exists because it is essential for the full enjoyment of the right of navigation (*per* the Lord Chancellor in *Gann v. The Company of Free Fishers of Whitstable*, 11 H. L., p. 192; 35 L. J. C. P., p. 29). Negligence consists in doing that which a person ought not to do, or omitting to do that which he ought to do, in disregard of the rights of another. He did not say that the act of navigating a vessel in the channel of a river containing insufficient water to float the vessel could not, under any circumstances, be an act of negligence, but the abstract doctrine above stated, on which the plaintiff for the purposes of this argument was forced to rely, was one which it was impossible to maintain. It would be as reasonable to contend that the user of a highway or land would be negligent and wrongful if locomotion should be impeded or delayed by mud or water on the highway, as to say that it is

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negligent to exercise the right of navigation in any case where a vessel cannot move without disturbing the bed of the river. As there was, in his opinion, no evidence of negligence on the part of the defendants, it was not necessary to determine the questions arising out of the second plea. It was said that it must be taken to have been found by the jury in their answers to the second and fourth of the questions which were put to them, that the plaintiff's chains were an obstruction if the defendants were not guilty of negligent navigation. The question of fact, did the chains obstruct the course of the river? had not indeed been directly affirmed or negatived. But if the defendants' vessels were rightly and without negligence navigating the river when the chains were carried away, the chains must, of necessity, have then and there obstructed the course of the river, and if they did the chains constituted a nuisance, which the defendants would be justified in abating. Every navigable river was a public highway, and one of the incidents common to it, and to a highway on land, was this—that a permanent obstruction placed in one or the other without lawful authority, which rendered it less commodious than before to the public, was a public nuisance at Common Law, punishable by indictment and removable by any member of the public whose right of user of the highway was obstructed by it (*The Eastern Counties Railway Company v. Dorling*, 5 C. B. N. S., p. 821, followed in *Marshall v. Ulleswater Steam Navigation Company*, L. R. 7 Q. B., p. 166; *Reg. v. United Kingdom Electric Telegraph Company Limited*, 31 L. J. (M. C.), p. 166; and *per* Mellish, L. J., in *Attorney-General v. Terry*, L. R. 9 Ch. App., p. 431). An attempt had been made to show that the use of these chains in the bed of the river was sanctioned by law. But the sections of the Borough Statute, and the Melbourne Harbor Trust Act 1876, relied on for this purpose, only showed that this ferry, considered as a means of transit, and also, perhaps, as an incorporeal hereditament having a certain value, was lawfully established, and could not be closed or removed without adequate provision being made in its place for the accommodation of the public. The particular mode of working the ferry by the use of chains has not been expressly authorised by either of these Acts of Parliament. And if it had been, it would still remain a question whether such an authority would not, like an express grant by the Crown of a part of the bed or soil of a navigable river, be subject to the right of the public to use the river for the purposes of navigation (See *per* the Lord Chancellor in *Gann v. The Company of Free Fishers of Whitstable*, 11 H. L., p. 192; 35 L. J. C. P., p. 29).

Mr. Justice Williams was of the same opinion. The point was a clear and a short one, and had been absolutely decided by the cases of *The Mayor of Colchester v. Brooks*, 7 Q. B. 339; and *Gann v. The Free Fishers of Whitstable*, 11 H. L. 192. The plaintiff at the trial based his case on three distinct branches of negligence by the defendants. The first complaint made by the plaintiff was that the defendant was guilty of negligence in navigating the vessels along this river at too great a rate of speed; that this excessive speed caused the vessels to break the chains of the ferry. That complaint was disposed of by the finding of the jury that the vessels were not travelling at an undue rate of speed. The next objection was that the injuries were caused by the malconstruction of one of the defendants' steamers; that there was an excrescence from the keel which broke the chains. The jury found that this excrescence did not exist, and that ground of complaint, therefore, disappeared. The third objection raised by the plaintiff was that the defendants were guilty of negligence in taking the steamers down the river when there was not a sufficient depth of water in it to carry them. The jury found that in favour of the plaintiff, and the Court had to decide whether that finding could be supported, whether there was any evidence of negligence by the defendants. According to the cases referred to it seemed to him that there was clearly no evidence of negligence. A vessel navigating any navigable water had a right, when using it, to get up and down the river as she liked. She had a right to the reasonable use of the water, and if she could work her way along she had a right to do so. If that were so there was no evidence of negligence in this case to go to the jury, and the plaintiff should be nonsuited. As to whether the chains were an obstruction to the river, it appeared necessarily to follow from the findings of the jury that they were an obstruction to the navigation. He doubted whether it was a proper question to be left to the jury at all. At the least it seemed to be a mixed question of law and fact. The inference from the decisions was that if a vessel was entitled to use the river as described, and if, in the reasonable use of it, she came in contract with these chains it must follow as a logical consequence that these chains were an obstruction to the bed of the river. The plaintiff was thus driven to the contention that the laying of the chains in the river was expressly authorised by an Act of Parliament. The argument for the plaintiff on this point was ingenious, but he thought there must be an express enactment by Parliament to authorise a thing to be done which, by Common Law, was distinctly and directly opposed to the navigation of a public highway. He therefore agreed that the plaintiff should be nonsuited. Rule absolute to enter a nonsuit.

Nov. 11.

Sanderson v. Fotheringham and Others.

Pounds Act 1873 (*No.* 478), *sec.* 14—*The words "within five miles of the place trespassed upon" means the place where the sheep were depasturing at the time they are seized—A poundkeeper is not the servant of the person impounding, but of the municipality.*

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Rule *nisi* to reduce damages from £73 15s. to £2. The plaintiff, Mr. J. Sanderson, sued the defendants, Messrs. Fotheringham and others, for damages for loss sustained in consequence of the defendants having illegally impounded sheep belonging to him. The defendants pleaded a justification of the impounding on the ground that they were the managers of the Bealiba Town Common, and that the plaintiff's sheep had trespassed upon it; that the plaintiff resided within five miles of the place where the trespass had occurred; that notice of the trespass had been given to the plaintiff; and that the sheep had, in accordance with section 14 of the Pounds Statute, been kept by the defendants for 48 hours before being impounded. There was another plea, that the plaintiff's residence was more than five miles from the place where the trespass occurred, that, therefore, no notice was necessary, and the sheep had been impounded without a legal notice having been given to the plaintiff that a trespass had been committed. It appeared in the evidence that as regarded the first plea the sheep had been kept only 46 hours and not 48 hours before being taken to the pound. As regarded the second plea the evidence was that the plaintiff's residence was less than five miles from the boundary of the common, but was more than five miles from the place trespassed upon. The plaintiff contended that the distance should be reckoned from the boundary of the common, and that, therefore, he was entitled to notice. The defendants contended that the distance should be reckoned from the place where the sheep were seized, and as that was more than five miles from plaintiff's residence, he was not entitled to notice. The plaintiff replied, alleging that even if the impounding were legal the defendants had been guilty of excess by overdriving the sheep when taking them to the pound. The plaintiff also claimed £2 5s. for pound fees, on the ground that if the impounding was illegal, the defendants should repay the sum paid to the poundkeeper, who it was contended was their officer. The rule was obtained to reduce damages to £2 for the excessive driving, on the ground that the defendants had a right to impound, and that they could not be called on to repay the pound fees, as the poundkeeper was not their officer, but that of the municipality. It was argued for the plaintiff that the land was not a common under the control of the defendants as managers. The common was proclaimed in 1863, under the Land Act of 1862, as the Cochrane's Goldfields Common. The management of goldfields commons was by that act vested in persons elected by the Mining Board. The Land Act of 1869 provided for the abolition of goldfields commons, and in 1871 this common was proclaimed by the Governor-in-Council as the Bealiba Common, under section 58 of the Land Act of 1869. The defendants, as members of the municipal council, claimed to be the managers of the common. The plaintiff contented that as section 57 of the Land Act of 1869 preserved the rights, duties, and obligations in reference to goldfields' commons, those commons still existed, and they could be managed only by persons appointed by the mining boards, and that as regarded this particular common, it was proclaimed as the "Bealiba Common," whereas the defendants had been appointed managers of the Bealiba Town Common. They had therefore no legal right to impound sheep trespassing on this common; they committed a trespass against the plaintiff in seizing his sheep, and were liable for any loss he had sustained in consequence of it, and not merely by the loss he sustained through the overdriving.

Mr. Purves, Dr. Madden, Mr. Mitchell, and Mr. Barrett appeared for the plaintiff; Mr. Hodges and Mr. Leon for the defendants.

The Chief Justice, after stating the facts said that in his opinion the Cochrane's Goldfields Common had been abolished under the Land Act of 1869, and that the Bealiba Common had been proclaimed under the act in its place. The defendants had succeeded in showing by evidence that the land where the sheep were seized was a common, and that they were managers of it. As to the question whether under section 14 of the Pounds Statute the words "within five miles of the place trespassed upon" should be held to include the whole of the common, or only the particular portion on which the sheep were depasturing at the time they were seized, it was apparent that the distance fixed by Parliament would be materially altered if it were to include the whole of the property. In one case the distance might be 10 or 20 miles, and in another much less than five. He was of opinion that the words "within five miles of the place trespassed upon" meant the place where the sheep were depasturing at the time they were seized, and therefore that the plea justifying the impounding had been proved. The jury had awarded the plaintiff £2 as damages for excessive driving, and the verdict would be reduced to that amount. It was contended for the plaintiff that the defendants having exceeded the authority given by the act, were trespassers *ab initio*, and were liable for all the damage that the plaintiff had sustained. He was of opinion that defendants were not trespassers *ab initio*. They had a right to take the sheep, but if they caused any damage to them they were answerable for that. The jury had fixed the sum which they ought to pay for that at £2, and the rule would be absolute to reduce the verdict to that sum.

Mr. Justice Higinbotham was of the same opinion. Two amended pleas had been pleaded in place of the former plea to the first count founded on the Common Law right of impounding, and which the Court held to be, in the present state of the law, a bad plea. The first amended plea alleged, amongst other things, that the plaintiff was resident within

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five miles of the place trespassed upon. The second plea alleged that neither the plaintiff nor any agent or overseer of the plaintiff was resident within five miles of the place trespassed upon. The defendants' case as to the reduction of damages must rest upon the second, and not upon the first plea. He thought that the actual spot where the seizure took place, and which in this instance was more than five miles from the house in which the plaintiff resided, and the actual place of residence of the owner, agent, or overseer, must be taken in every case to be the true termini of the statutory limit of distance. This view was most in accordance with the natural meaning of the words of the 14th section. The difficulty which a distrainor must experience in any case like the present would be increased, not diminished, if it should be held that the distance was to be measured from the nearest point either of the whole property of the distrainor or of the field or paddock trespassed upon. The view they took of the meaning of the words "place trespassed upon" will not be inconsistent with the decisions of this Court upon similar words in section 19. In both sections the spot where cattle are trespassing, or are found trespassing at the time of seizure, is the spot referred to. But the direction in section 19 to specify that spot in the written memorandum for the poundkeeper will be sufficiently complied with, if the purpose of indicating to the trespasser the locality of the property of the distrainor on which the cattle have been seized is satisfied by the use of more general words (*Wingfield v. Glass*, 6 W. W. & A'B. (L.), p. 4; *Pettett v. Millies*, 1 A. J. R., p. 64). It was not the law that cattle seized as a distress damage feasant must be conveyed to the nearest pound immediately and without any delay. No time was expressly fixed by the Act of Parliament, and, therefore, the general rule was applicable that wherever an act is directed to be done but no precise time is appointed for doing it, it must be done at and within a reasonable time for conveying cattle to the nearest pound were, however, indicated in the act with tolerable distinctness. In cases coming within the five-mile rule cattle seized as a distress must not be impounded until after the lapse of 48 hours. In all cases the distrainor may restore the cattle seized to the owner, and for that purpose detention for a time, longer or shorter according to the circumstances of each case, might be necessary, and would, therefore, be reasonable But the distrainor might not, in any case, detain cattle which he had seized, and which he was not required to supply with food or water, beyond the limit of three days, without forfeiting his right to trespass rates. The rule in the present case did not call upon them to determine whether there was any evidence of unreasonable delay in sending the cattle to the pound; it only asked that the verdict on the first count should be reduced to £2, which included the amount assessed by the jury for delay. But it had been argued by Mr. Mitchell that, as the jury had found that there was unreasonable delay in detaining the cattle from 3 p.m. on Sunday till 3 p.m. on Tuesday, the defendants became trespassers *ab initio*. He did not think that *Smith v. Eggington*, 7 Ad. & E., p. 167, cited by Mr. Hodges, furnishes an answer to this argument. The distinction drawn by Mr. Justice Littledale between wrongful acts which could and which could not be anticipated at the time of the original alleged trespass is not applicable to the facts of the present case. But he thought that the rule in the six carpenters' case was rendered applicable to the case of distress, damage, *fiasant*, as well as to the case of distress for rent by the terms of the statute law. The Act 11, Geo. II., c. 19, sec. 19, provided for the relief of "landlords and other persons entitled to rents" that a subsequent irregularity should not render the distress unlawful, nor the distrainor a trespasser *ab initio* "where any distress should be made for any kind of rent justly due." This section was altered when it was adopted by the Legislature of this colony in the Act 15 Vict., No. 4., sec. 9 (Adamson's Acts II., p. 875) so as to apply to any case "where any distress shall be made for any rent or sum justly due." Although this change was made in the law relating to landlord and tenants and still appears on the statute book in the same connection (The Landlord and Tenant Statute 1864, sec. 84), the words introduced, if they have any meaning at all assigned to them, must relate to sums due, differing from rent, for which alone, payable under an actual demise, a landlord can distrain (*Dunk v. Hunter*, 5 B. & Ald., p. 322); and they could only relate, therefore to sums due and recoverable under a distress damage feasant, or a distress levied for penalties imposed by Act of Parliament. Assuming that the defendants did commit an irregularity subsequent to the seizure, he thought, therefore, that they would not become trespassers *ab initio* by virtue of that irregularity. With regard to the appointment of the defendants as the managers of the common, and the re-proclamation of the common, he concurred with the judgment which had been given by the learned Chief Justice. As to the claim for money received under the second count it was clear that the poundkeeper was not the servant or officer of the defendants, but of the municipality; and his receipt of the moneys claimed was not a receipt by the defendants to the use of the plaintiff.

MR. JUSTICE WILLIAMS concurred. As to the sums received by the poundkeeper, they were not received by him as servant of the defendants as managers of the common, but as the servant of the municipality, and, therefore, a verdict should be given for the defendant on that count. The only question was whether the plaintiff could hold the damages given to him on the first count. The rule asked that these damages should be reduced, on the

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ground that the second plea was proved, namely, that the sheep were trespassing on defendants' common, and that the plaintiff did not live within five miles of the place trespassed upon, and, therefore, that the cattle could be impounded without notice being given to the plaintiff, and that defendant had only detained the sheep for a reasonable time and for the purpose of impounding them. He was of opinion that the defendants had proved that they were managers of this common. It had been originally the Cochrane's Goldfields Common. But that common was abolished under the Land Act, 1868, and it was re-proclaimed under section 58 of that act as the Bealiba Common. Whether it was known as the Bealiba Common or the Bealiba Town Common, there was evidence that the defendants were managers of it. As regarded the five miles limit, he thought it must be taken from the spot where the trespass was committed, and not from the boundary of the common. It was said for the plaintiff that the common consisted of land not sold or appropriated, and that the defendants had not shown that this land was not sold or appropriated. But there was evidence by the defendants to show that this land formed part of the common, and it was for the plaintiff then to show that the land had been sold or appropriated. But it was said for the plaintiff that the sheep were detained for an unreasonable time. As the Court was at liberty to draw inferences of fact, he was disposed to say that he did not think they had been detained for an unreasonable time. The plaintiff had claimed under a new assignment for excessive driving, and on that the jury had given damages, finding that the detention was not unreasonable. The statute allowed the defendants to detain the sheep for a reasonable time, and even if the time of detention was excessive it would not constitute the defendants trespassers *ab initio*, but merely render them liable to damages for the excess. What they did was not inconsistent with their right to impound or to detain for the purpose of impounding. The plaintiff was therefore entitled to only the £2 awarded by the jury for the excess.

Rule absolute to reduce the damages for the plaintiff to £2.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

Melbourne, Nov. 20.

IN THE MATTER OF E. J. W. CHAMBERS (AN ATTORNEY), *Exparte* SPEED, AND HASKER (ASSIGNEE.)

Common Law Procedure Statute 1865 (*No.* 274), *secs.* 388, 392—*Taxation of bill of costs—A bill of costs will be ordered to be delivered under the Act only in cases where a bill if delivered could be referred to taxation—Where a bill has been paid and more than a year has afterwards elapsed it cannot be ordered for taxation.*

Summons on behalf of Speed, an insolvent, and Hasker, his assignee in insolvency, calling upon E. J. W. Chambers, an attorney, to show cause why he should not deliver to the insolvent, or his assignee, a signed bill of costs and charges in certain causes and matters between the insolvent and the firm of Moore, Doward and Co., and also between the insolvent and one M'Intosh, and why such bill, when delivered, should not be referred to the Prothonotary to be taxed.

The affidavit of Speed in insolvent stated that in and prior to the month of July, 1883, he consulted with one Pennefather, who was acting as agent for Chambers at Echuca, with reference to certain proceedings to be taken by him against Moore, Doward and Co., to recover certain moneys, and that a plaint summons was issued on the 31st of July to recover a sum amounting to over £200. That an offer was made to settle the matter, and that he instructed Pennefather to settle the action on payment of £104 and all costs; and that he instructed one Morphett to receive the said sum of £104. That Pennefather received the sum of £134 10s. 8½d. on his behalf, and paid to Morphett on or about October 7, 1883, the sum of £56 18s., deducting the sum of £67 12s. 8½d. as costs in reference to this matter, and a further sum of £10 to anticipate certain costs in a matter with one M'Intosh, then about to be submitted to arbitration. That immediately on receipt of the said sum he wrote to Pennefather for a statement of account and for the costs of Chambers in the matters, and his assignee also applied for the same, but that neither he, nor his assignee, nor Morphett, his agent, ever received such statement or bill of costs.

The affidavit of Hasker, the assignee, corroborated the affidavit of Speed, and further stated that he gave notice to Pennefather on or some time prior to October 17, 1883, that he was the assignee of Speed and as such claimed any moneys payable to Speed,

The affidavit of Cohen stated that, as attorney for both Speed and Hasker, he applied to Chambers for his bill of costs, but that Chambers refused to deliver it on the ground that a draft bill of costs had been shown to Morphett as agent for Speed on the settlement, and that he (Morphett) had expressed himself as satisfied.

The affidavit of Pennefather, after stating the facts leading up to the proceedings against Moore, Doward and Co., further stated that shortly after the commencement of the proceedings Speed left Echuca, but informed him that Morphett would act for him (Speed), and had full authority to effect any settlement on his (Speed's) behalf. That Moore, Doward and Co. made an offer of settlement, and that Morphett directed him to accept the offer on behalf of Speed. That he accordingly did settle the matter, and that afterwards Morphett produced a telegram from Speed, and asked him to pay over the balance coming to Speed in respect of his action against Moore, Doward and Co. That he then procured from Chambers' managing clerk a draft

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bill of costs and charges against Speed, together with a memorandum showing the balance due to Speed, and that Morphett, after looking through the document, said that he was perfectly satisfied, and asked for a cheque for the balance. That he then, on October 9, 1883, gave Morphett, on behalf of Speed, a cheque for the sum of £57 12s. 8d., and that Morphett gave a receipt for it. That, on the October 17, 1883, being eight days after the settlement with Morphett, he received a notice from Hasker informing him that Hasker was Speed's assignee, and that this was the first information he had of Hasker's claim. That Speed commenced an action against M'Intosh in July, 1883, but that the matter was referred to arbitration, and was finally settled about June 1884, and that he settled with Speed on June 5, 1884, who gave him a receipt in full satisfaction and discharge of all moneys due by him to Speed in respect of the action against M'Intosh.

The affidavit of Morphett states that Speed informed him he was going to leave Echuca, and asked him to watch and conserve his interests in the action against Moore, Doward and Co.; that on October 8, 1883, he received a telegram from Speed authorising him to receive the money from Pennefather at once, to prevent the official assignee getting it, and further corroborates Pennefather's affidavit with regard to receiving the moneys, inspecting the draft bill of costs, and giving a receipt.

Mr. Phillips in support of the summons; Mr. Skinner to oppose.

His Honor said: In this case a summons has been taken out by J. M. Speed, an insolvent, and J. Hasker, his assignee in insolvency, calling upon E. J. W. Chambers, an attorney, to show cause why he should not deliver to the insolvent, or his assignee, a signed bill of costs and charges in certain causes and matters between the insolvent and the firm of Moore, Doward and Co., and also between the insolvent and one M'Intosh, and why such bill, when delivered, should not be referred to the Prothonotary to be taxed. These two causes and matters are distinct and must be treated separately. The order may go for the delivery of the bill of costs, and for reference to taxation in the action of *Speed v. M'Intosh*, referred to arbitration. The alleged final settlement of the action and costs on June 5th, 1884, does not furnish, in my opinion, sufficient reason for refusing this part of the application.

The application, as regards the action brought by the insolvent against Moore, Doward & Co., stands on a different ground. On October 9th, 1883, a settlement was made between the agent of the insolvent, Mr. Morphett, and the agent of the attorney, Mr. Pennefather. A draft account of the costs was shown to Morphett, who received a cheque for the balance, £57 12s. 8d., and gave a receipt, expressing himself perfectly satisfied with the settlement. This was done at the instance, and with the express concurrence of the insolvent, who, aided by Mr. Pennefather, was anxious to anticipate and defeat a claim which he expected the assignee would make for the money. The transaction amounted to payment without pressure, and it occurred more than a year before the date of the present application on October 13th, 1884. A bill of costs will be ordered to be delivered under the Act only in case where a bill, if delivered, could be referred to taxation. And where a bill has been paid and more than a year has afterwards elapsed it cannot be ordered for taxation (*Re Sutton*, 11 Q. B. D. 377). This part of the application must on this ground be refused. If the application had been made within twelve months after payment, there are no special circumstances, nor additional special circumstances within the meaning of sections 388 and 392 of the Common Law Procedure Statute, 1865, existing in this case which would justify the granting of the application at the instance of the official assignee. If the application had been made within the same time by the insolvent alone, who appears to be the person chiefly or wholly interested in it, I should have no hesitation in refusing it. I give no costs of this summons to the attorney, Mr. Chambers, though he is successful as to the larger part of it. He cannot be regarded as free from responsibility for the conduct of Mr. Pennefather, who describes himself as a practitioner and also as a barrister-at-law. The practice of Mr. Pennefather in this matter has been throughout highly irregular, and he has been allowed to make charges ostensibly for the attorney as his principal, which, though not now taxable, appear to be excessive.

Solicitors: For applicants, *Phillips* and *Cohen*; for Chambers, *Chambers*.

Nov. 19, 24.

Freehold Investment and Banking Co. of Australasia Limited v. Thompson.

Rules of Supreme Court 1884, *Order XXIII, r. 5*.

It is only the plaintiff who can file the memorandum of the close of the pleadings, and he should not file it until issue has been joined between all the parties and the whole of the pleadings have been thereby brought to a close.

A summons was taken out by the defendant under Order XXXI., r. 21, and was dismissed. During the course of the argument, Mr. Box, for the defendant, stated that the defendant had delivered a counter-claim, bringing one Robb as a defendant of the counter-claim, and that Mr. Justice Holroyd had directed that the claim and counter-claim should be tried together. The defendant, as plaintiff on the counter-claim, tendered a memorandum of the close of the proceedings, but the prothonotary refused to accept it. The pleadings had been closed more than four clear days, and the plaintiffs have filed a memorandum of the close of

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the pleadings on the claim, and have paid the jury fees. Mr. Box now asked that the prothonotary should be instructed to allow the defendant to file a memorandum of the close of the pleadings under the defendant's counter-claim.

MR. ISAACS for the plaintiffs; MR. HODGES for Robb.

HIS HONOR said: The summons was heard and dismissed on November 19th. An application was made by the defendant during the argument that the prothonotary should be instructed to allow the defendant to file a memorandum of the close of the pleadings under the defendant's counter-claim. The prothonotary was of opinion that such a memorandum by the defendant should be filed within four days after the close of the pleadings upon the counter-claim, and he refused to accept the defendant's memorandum because it was not presented within that time. I have seen the prothonotary and I think that he was in error in allowing the plaintiffs to file their memorandum before the whole of the pleadings had been closed. The words "within four clear days after the close of the pleadings" in rule 5° of Order XXIII. mean, I think, after the close of the whole of the pleadings, and not merely after the close of the pleadings between particular parties referred to in rule 5 immediately preceding. This appears from the provisions of subsequent rules. By Order XXXVI., rule 11, immediately after the memorandum of the close of the pleadings has been filed by the plaintiff, the prothonotary is to enter the cause for trial or assessment at the next sittings in Melbourne or the place of trial; and within seven days after the cause has been so entered the plaintiff is required, by Order XXXVI., rule 30, to deliver to the prothonotary two copies of the whole of the pleadings. This last requirement cannot be complied with by the plaintiff if he has to file the memorandum before the whole of the pleadings are completed. It is only the plaintiff who can file the memorandum, and he should not file it until issue has been joined between all the parties and the whole of the pleadings have been thereby brought to a close. As both parties in this case are desirous that the cause should be set down for trial in the list for next month, the memorandum filed and the entry and notice of trial may stand, and the plaintiffs can deliver to the prothonotary copies of the whole of the pleadings as soon as they are completed.

Solicitors: For plaintiffs, *M. H. Davies*; for defendant, *Sievwright*; for Robb, *Eggleston*.

(Before His Honor Mr. Justice Molesworth.)

BELL v. CLARKE. Nov. 28.

Appeal against chief clerk's decision—Taking accounts in suit—Discretionary power of chief clerk—It rests entirely with the chief clerk to direct what parties shall bring in accounts.

An appeal had been made by the defendant against a decision of the chief clerk (Mr. Walker) on the taking of accounts in this suit. The suit was brought by Mr. G. M. Bell against Mr. Joseph Clarke for accounts in reference to the sale by the plaintiff, the defendant, and several other persons of some properties in New Zealand to the New Zealand Agricultural Company Limited (in England). The defendant was held in the original decree to be answerable for any sums which but for his wilful default should have been received. He brought in accounts showing that he had not received anything for which he should account. The plaintiff objected that defendant should have received a sum of £200,000 if he had not given up debentures and shares to the company to that amount, and also £302,000 for shares the dividends on which were by him deferred permanently. The chief clerk allowed the objections and held the defendant chargeable on the taking of the accounts with those amounts. The defendant asked that the plaintiff should be ordered to bring in accounts showing the transactions between him and the defendant, but this was objected to on the ground that the plaintiff had not been directed to furnish any accounts, and had nothing to account for. The chief clerk agreed with the plaintiff and the defendant appealed.

DR. MADDEN and MR. HIGGINS for the plaintiff; MR. WEBB, Q.C., and MR. A'BECKETT for the defendant.

MR. JUSTICE MOLESWORTH gave the following judgment: The first objection taken before me to the apparent intention of the chief clerk in taking accounts under the decree is to the allowance of objection 5A of the plaintiff's surcharge to the accounts and statements brought in by the defendant pursuant to directions of September 17, 1884, that item being £200,000 on October 17, 1882, in respect of the shares and debentures wrongfully surrendered to the company as on that date. In argument upon this it has been stated that this is virtually charging the defendant twice over, that he had charged himself with £505,190, of which the £200,000 formed a part. But the defendant had no reason to suppose that in preparing his certificate the chief clerk would continue the entire charge of £505,190. As to the main meaning of my decree, it was that the defendant held property of the plaintiff as a mortgagee—debentures and shares in a company—and having power so to do, had unwarrantably, by deed October 17, 1882, agreed to vary rights as to debentures and shares. He was chargeable with his receipts as a mortgagee, and I think that the simplest way of working out the decree would be to treat him as having at that date made himself liable to be charged with the value of the shares and debentures as they were. This would exclude all questions of what defendant

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actually received for shares or debentures after, or dividends or interest on them, of variations in their value, rising or falling, afterwards. I do not say this to be the rigid effect of the decree. I understand that £200,000 of debentures were actually cancelled by the defendant and given up to the company, so that I may treat this objection as regarding debentures only. There appears no doubt of the adequacy of the landed security for these debentures, so that I think that they should be taken as worth so much. The next objection is to £302,000 in surcharge allowed, upon which it appears that the chief clerk has received some evidence, but was willing to receive more. This may be taken to refer to shares, as to which I think the same principle of charging with the value of shares, and stopping account at date October 17, 1882, should be conveniently applied. But there is a greater difficulty as to measuring value, as such shares had then no marketable value; but the value of the classes of shares which were in the market may be called to aid investigation, and also other evidence of opinion. It would be impossible, or very inconvenient, to take accounts as to dividends or shares hereafter, measuring what may be lost or diminished, as a result of the deed of October 17, 1882, and the decree contemplated the taking of a mortgage account, striking a cash balance, but defining what shares and debentures should be deemed after it to be the property of the plaintiff or defendant. As to the objection of the decision of the chief clerk that the plaintiff is not under the decree an accounting party, and his consequent refusal to direct the plaintiff at the defendant's instance to bring in certain accounts of his dealings and transactions with the New Zealand Agricultural Company, or to receive evidence tendered by the defendant to show that the plaintiff had dealings and transactions with the company as to which accounts were required, I have only to say that it is entirely for the chief clerk to direct what parties should bring in accounts. I have had no specific statement as to evidence tendered by the defendant and rejected, so as to express an opinion.

(Before His Honor Mr. Justice Higinbotham).

Nov. 22, 26, Dec. 1.

NORTON v. WILLIAMSON AND OTHERS.

Review of taxation—Breach of contract—Damages—Allowance of maintenance—The damages in an action founded upon breach of contract to retain and employ for a given term are to be an indemnity to the plaintiff for his losses by the breach of contract—The jury in assessing the damages may look to all that has happened, or (if the action is brought immediately upon the wrongful dismissal, and before the end of the period of service), to all that is likely to happen to increase or mitigate the losses of the plaintiff down to the day of trial—They cannot include in such damages as a separate item the plaintiff's maintenance as a witness during the time he was awaiting trial as a witness—The prothonotary has a discretion to make such order, as to the allowance to a plaintiff as a witness for maintenance during an enforced detention at the place of trial, as he may think reasonable.

Application on behalf of the defendants for review of taxation of certain costs allowed by the prothonotary to the plaintiff.

MR. HOOD for the defendants; MR. HODGES for the plaintiff.

The facts and arguments appear sufficiently from the judgment.

HIS HONOR said: This is a summons taken out by the defendants to review the taxation of the costs allowed by the prothonotary to the plaintiff in respect of the maintenance money allowed to the plaintiff during his detention in Melbourne awaiting the trial pending the return of a commission obtained by the defendants. The action was for breach of a contract, by which the defendants agreed to employ the plaintiff as an actor during a period of six months, commencing November, 1883, at a fixed salary during the first three months, and at a percentage of the profits of the entertainments at the rate of one-third of the gross receipts of the performances during the last three months. On January 14th, 1884, and shortly before the end of the first three months, the defendant dismissed the plaintiff. On January 19th the plaintiff commenced this action. The cause was set down for trial at the February sittings, when, on the application of the defendants, the trial was postponed, and a commission for the examination of witnesses abroad was granted. On May 3rd the second three months of the contract would have been completed. The trial took place on August 19, and subsequent days. The prothonotary allowed the plaintiff for 214 days' detention, from January 19 to August 19, at 12s. 6d. a day. The defendants admitted that the prothonotary had a discretion to allow for the plaintiff's detention from May 3 to August 19, but they contended that as to the period from January 19 to May 3, for which the sum of £65 2s. 6d. has been allowed for maintenance, the damages awarded by the jury should be held to include that amount, because the plaintiff would be bound, whether he had been detained awaiting the trial or not, to maintain himself during that period. The damages in an action founded upon breach of contract to retain and employ for a given term are to be an indemnity to the plaintiff for his losses by the breach of the contract, and although, if other equally eligible employment can be procured by him, whereby his losses may be mitigated, the indemnity may be reduced to a small or a nominal amount, according to the real loss, the employment under the contract may be such that the damages may exceed the salary (*Emmens v. Elderton*, 13 C. B., *per* Crompton, J., at p. 508; and *per* Earle, J., at p. 519). The jury in assessing

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the damages on a breach of contract of this kind may look to all that has happened, or (if the action is brought immediately upon the wrongful dismissal and before the end of the period of service) to all that is likely to happen to increase or mitigate the losses of the plaintiff down to the day of trial (*Hochster v. De la Tour*, 2 Fl. and Bl. 678). But they would not be at liberty, I think, to include in such damages as a separate item the plaintiff's maintenance as a witness during the time, long or short, that he was awaiting trial as a witness, because such expenses, although necessary, would not be damages resulting from the breach of the contract sued upon. The case of *Delaroque v. S. S. Oxenholme and Co.* (Bittleston's reports, 1883-4, p. 44) is distinguishable from the present case, as Mr. Hood has pointed out, but the reason of the decision is applicable. The two remedies, damages for breach of a contract and allowance to the plaintiff as a witness for maintenance during an enforced detention at the place of trial, are not *ad idem*—the former does not include the latter, and the prothonotary has a discretion to make such order in respect to the latter as he may think reasonable.

The summons will be dismissed with costs. I certify for counsel.

Solicitors: For plaintiff, *Gillott* and *Snowden*; for defendants, *Lynch* and *M'Donald*.

(Before His Honor Mr. Justice Williams.)

Nov. 28.

HEPBURN AND ANOTHER v. DAWBIN.

Common Law Procedure Statute 1865 (*No.* 274), *sec.* 88—*Expiration of writ—Renewal—A judge has no power to order the renewal of a writ after it has expired.*

Application by the plaintiffs, under sec. 88 of the Common Law Procedure Statute, for the renewal of a writ of summons.

The facts appear sufficiently from the judgment.

HIS HONOR said: The writ of summons in this action was issued on the 29th May, 1883; it was renewed on the 28th November, 1883, and further renewed on the 27th May, 1884. Up to this time the renewals were regular. The latest date on which the writ could be renewed was the 27th November, 1884, but the application was made to me on the 28th November, 1884, when the writ had expired. Sec. 88 of the Common Law Procedure Statute provides that a writ can be renewed during its currency, but no provision is made for renewal after the expiration of the writ. I do not think I have power to renew a writ after it has expired. If I were to order the taxing officer to renew this writ I would be forging the possession of evidence.

Solicitors: For the plaintiffs, *Bennett, Attenborough, Wilks*, and *Nunn*.

Nov. 29.

TAYLOR AND ANOTHER v. PORT.

County Court Statute 1865 (*No.* 345), *sec.* 43—*Remission of action to County Court—The words "other action" in sec.* 43 *refer to all actions of tort not specifically enumerated in the section—Procedure to be observed in application under sec.* 43 *of the County Court Statute*, 1865, *for remission of an action from the Supreme Court to the County Court.*

The defendant had obtained a conditional order for the remission of this action to the County Court. The application was made *ex parte*. The affidavit in support of the application merely stated that the plaintiffs had no visible means of paying the defendant's costs, without stating the reasons for coming to such a conclusion, and that the action was a fit one to be prosecuted in the County Court.

MR. DONOVAN, for the plaintiffs: The action is one for negligence, and is brought by the plaintiff and his wife for the negligent act of the defendant in driving over and injuring the female plaintiff. The affidavit of the plaintiffs' solicitor states that the male plaintiff is a surgeon, and has been carrying on his profession for the last 17 years. A plaintiff in such a position will not be taken to be incapable of paying a defendant's costs unless good cause for such belief be shown. The action being one for negligence many difficult points of law may arise. I submit also that an action for negligence is not an action for tort within the meaning of sec. 43 of the County Court Statute.

MR. PIRANI for the defendant.

HIS HONOR said: In this case certain proceedings have been taken before me in Chambers under the 43rd section of the County Court Statute for the purpose of having this action stayed in this Court and remitted to the County Court. The plaintiffs contend that the action, which is one for injuries sustained by negligence, should be allowed to proceed in the Supreme Court for two reasons. (1.) That an action of negligence is not an action of tort within the meaning of sec. 43 of the Statute; and (2) that plaintiffs have visible means of paying the costs of the defendant in case of an adverse verdict. I think that the words "other action of tort" in section 43 refer to all actions of tort not specifically enumerated in the section. Some effect must be given to these words if possible. To limit them by the doctrine of *ejusdem generis* to the class of actions specifically enumerated would be to give them no effect at all, and no effect short of what I have ventured to give them would be either certain or reasonable. They must either have given to them the full effect of including all actions of tort other than those specifically enumerated, or no effect at all. It is my duty if possible to give them some effect, consequently I am driven to give them the full effect. This action, therefore, being one of negli-

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gence, though not specifically enumerated in the 43rd sec., falls within the purview of that section, and is capable of being dealt with under that section. But I do not think I should stay this action in the Supreme Court and remit it to the County Court. The defendant, to show me that the plaintiff has no such visible means as are mentioned in this section, has filed an affidavit, which baldly states a conclusion of fact in the terms of the section, but states not one single premise to show me that he was warranted in swearing to that conclusion. Had this affidavit not been answered I might have been satisfied, but it is answered sufficiently to throw the onus on the defendant of setting forth the particular grounds on which he bases his conclusion of fact. This onus he has not performed or attempted to perform. I am, therefore, by no means satisfied that the plaintiffs have not such visible means as are mentioned in the section, and I allow the action to proceed in the Supreme Court so far as regards this particular case. But the practice under this 43rd sec. of the County Court Statute requires to be settled once for all, and with that view I have conferred with my brothers, Higinbotham and Holroyd, and I proceed now to state the procedure which we desire should be observed in applications made under the 43rd section. Apparently a defendant may under the first portion of the section apply on such an affidavit as is required by the section for an "*ex parte*" conditional order, in other words for an order staying proceedings in the Supreme Court and remitting to the County Court, *unless* the plaintiff do either one of two things within a time to be named in the order. (1.) Give full security for the defendant's costs to the satisfaction of the prothonotary; (2.) Satisfy a judge that he has a cause of action fit to be prosecuted in the Supreme Court. But on consideration we think it unadvisable that the application for the conditional order under the first part of the section should be made *ex parte*, as the effect of allowing this to be done may be to shut the plaintiff out from showing that he has visible means, and to confine him to performing one of the two conditions mentioned in the section, and to be mentioned in the conditional order. In all future cases, therefore, the application for the conditional order must be made on summons calling on the plaintiff to show cause why such conditional order should not be made. If on the return of that summons plaintiff can show that he has visible means, or the judge is not satisfied that he has not "*cadit quæstio*," the matter ends and the summons is dismissed. But if on the return of that summons the judge be satisfied that the plaintiff has no such "visible means," then the conditional order mentioned in the section and previously specified in this judgment is made, and under it, and within the time mentioned in it, the plaintiff has either (1) to give the security for costs, or (2) to satisfy the judge that his action is a fit one to be prosecuted in the Supreme Court. If he does neither within the time the conditional order makes itself absolute. If he does the first he merely gives notice of the fact to the other party. If he proposed to do the second he should give notice, of course in writing, to the other side, that on a certain day, at a certain time, within the time limited by the order, he will appear before a judge to satisfy him that he, the plaintiff, has a cause of action fit to be prosecuted in the Supreme Court. The other side can then either attend before the judge or not at will; and if the judge be satisfied that the plaintiff has such fit cause of action, the judge states that he is so satisfied and makes an order allowing the action to proceed in the Supreme Court. If the plaintiff fail to so satisfy him the conditional order becomes absolute. I give no costs.

Solicitors: For the plaintiffs, *Pyman*; for the defendant, *Braham* and *Pirani*.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Molesworth.)

Nov. 21.

Re THE BUZOLICH PATENT PAINT CO.,

The Companies' Statute 1864 (*No.* 190), *sec.* 73—*Winding-up company—Company carried on at loss—Petition—Majority of shareholders—The fact that a company has from the first been carried on at a loss is no ground for allowing an application for winding-up the company compulsorily.*

This was a petition by certain shareholders in the Buzolich Patent Damp-resisting and Anti-fouling Paint Company Limited, praying that the company should be wound-up by direction of the Court.

MR. A'BECKETT and MR. GOLDSMITH appeared for the petitioners in support of the application to wind-up the company; MR. MOORE for a shareholder also in support of the petition; MR. TOPP on behalf of the company to oppose the petition.

HIS HONOR said: This is a petition for the compulsory winding-up of the Buzolich Patent Damp-resisting and Anti-fouling Paint Company Limited, registered under the Act 190. The application was under section 73—a general clause that where the Court is of opinion that it is just and equitable that the company should be wound-up it may make an order for winding-up. The first and most material ground of the application is that the company has from the first been carried on at a loss—a fact admitted, but which has in various cases under the English act been held insufficient (*Re Langham Skating Rink Company*, 5 C. D. 669; *Middlesborough Assembly-room Company*, 14 C. D. 104; *National Live Stock Insurance Company*, 26 Beav. 153.) The petition alleges that there is no prospect that a business can be carried on at a profit. As to that there is a conflict of evidence. The petition alleges that the company is largely indebted. It is not, and could not be, alleged that it is unable

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to pay its debts by calling on its unpaid capital. The petition alleges that the patent rights for working which the company was formed have not been transferred to it. This appears to be a temporary result of accidents easily removed. If a company suffers such an injury, other means besides winding-up should be sought. The petition says that the plans proposed for preparing paints in the specifications would not produce paints at a price to compete with other makers. The fact is controverted, and it would form no ground for winding-up. The petition alleges that the company has never worked under the patent, as to which it is inconsistent with itself and sufficiently contradicted. By one affidavit it is said the specifications could not be carried out at all, but the petition said nothing of the kind. The petition alleges that at a general meeting in May, 1884, three directors retired, and were unanimously re-elected directors; but the other directors refused to recognise them, on the ground that they were indebted for calls. As far as I have considered, I think the objection was well founded. The matter would be no ground for compulsory winding-up, and so as to the remaining objections (*Bailey v. Birkenhead*, 12 Beav. 433; *Wheal Lovell Mining Company*, 1 M'N. & G. 1). The other directors, it is alleged, appointed Mr. Roberts a director, holding contributing shares as an executor, but not in his own right. The objection seems to me well founded. The petition then states the convening of an extraordinary general meeting for various purposes—some I would think within its powers, others not; then the directors convened another such meeting for August 15, for various purposes, to rescind a call of July 14 and various other purposes inconsistent with their former acts, and going, I would think, beyond the powers of such a meeting. A majority at that meeting resolved to rescind the call of July 14, 1884, and appointed a board of directors. On August 16, this new board of directors rescinded the call of July 14, and made another of same amount in lieu of it. On September 6, some of the old directors excluded the new nominees, and requested some old directors to resume, which they did, and were advised that the resolutions at the general meeting of August 15 were invalid, and therefore proceeded to enforce the call at the Melbourne County Court. But the learned judge decided for the defendants, not, as I take it, because the call was invalid, but because the shares had not been forfeited. There is an appeal from this decision. The petition then alleges that some directors are making another call in order to exclude the petitioners and other recusants from voting. The petition alleges various other unfair intentions of the directors. I have to decline interfering as to these squabbles in favour of the majority in the shape of making a winding-up order. If the conduct of the actual directors is so distasteful to the shareholders that a majority of three-fourths wish for a voluntary winding-up, such majority can effect its object; but until that is done, I shall leave the law under which the shareholders have placed themselves to work itself out. I dismiss the petition, with costs.

Petition dismissed, with costs.

SHEVILL V. AFFLECK. Nov. 26.

Administration suit—Widow entitled in event of children dying without issue—Commission to trustees at 4 per cent.

This was a suit for the administration of the estate of the late Mr. Wm. Affleck, who died in 1866. By his will Mr. Affleck gave his estate to executors and trustees on trust to pay certain specific legacies and annuities, and bequeathed the rest of his estate (subject to an annuity of £1000 to his wife) to be divided among his children when they attained the age of 21. When he died in December, 1866, there were no children born, but six months after his death his wife gave birth to a son. In 1875 this son died, and his mother obtained administration to his estate. In 1869 Mrs. Affleck married the defendant, Mr. J. W. Shevill. As to the estate of her first husband she claimed that she was entitled to receive the whole in consequence of the death of the son under age, as Mr. Affleck had made no provision in his will as to what should be done with his property in the event of his children dying without issue. The defendants were the trustees of the will. The amount of the estate was £28,000.

MR. WEBB, Q.C., and MR. TOPP appeared for the plaintiff; MR. A'BECKETT for the defendant Mr. John Affleck; MR. HIGGINS for the defendant Mr. Shevill.

HIS HONOR made a decree declaring that the plaintiff was entitled to the estate of her husband, the trustees to be paid a commission of 4 per cent. for their trouble in managing the estate, costs of the suit to be paid out of the estate.

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

DAVEY V. PEIN. Dec. 1.

Appeal—Suit defective for want of parties—Leave to amend—Joining absent infant—Next-of-kin necessary parties to suit by trustee in insolvency to recover policy of insurance on life of deceased insolvent—Life Assurance Companies Act 1873 (*No.* 474), *sec.* 37—*Construction and application—Appeal Court refused to decide question of construction while decision pending before primary judge.*

This was an appeal from a decision of Mr. Justice Molesworth, in which he held that this suit was defective for want of parties, and gave the plaintiff leave to amend the bill. The suit was brought by Mr. Davey as trustee of the insolvent estate of Henry Luth, of Echuca, to be declared entitled to policy of insurance effected in the

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National Mutual Insurance Company on his life. Luth died after his insolvency. He had before his insolvency assigned the policy to Pein voluntarily, and Pein executed a declaration of trust that he held it for Luth's children. Mr. Justice Molesworth decided that the plaintiff should have made the personal representative of Luth a party to the suit, and that an infant child (Herbert O'Hara Luth) should also have been made a defendant. Against this decision the plaintiff appealed.

MR. WEBB, Q.C., and MR. HIGGINS for the plaintiff, appellant; MR. GREGORY for the defendant, Pein; MR. A'BECKETT for the other defendants (infants); and MR. WEIGALL for the National Mutual Life Insurance Company.

The case was argued on the 28th August last, and judgment was now given.

MR. JUSTICE HIGINBOTHAM said: This was an appeal from the decision of the learned primary judge directing that the cause should stand over to enable the plaintiff to amend the bill by making the next-of-kin of Henry Luth parties to the suit. We have examined this case, and have weighed the arguments addressed to us with great care, and have found that the case presents many points of unusual difficulty connected with the adverse rights of different parties, and the proper construction and mode of applying the 37th section of the Life Assurance Companies Act, 1873, to which we have been referred. We abstain from expressing an opinion upon any of those questions, as they have still to be dealt with by the primary judge. But the case presents aspects in which the next-of-kin may be necessary parties to the suit. The primary judge, as the person to whom the infants have submitted their interests, has held that the infant child of the second marriage, Herbert O'Hara Luth, ought to be made a party, as being one of the next-of-kin, and we are not prepared to say that in our opinion that decision was wrong. The appeal will be dismissed, without costs.

MR. JUSTICE WILLIAMS concurred.

MR. JUSTICE HOLROYD said: I am not prepared to dissent from the judgment of the Court, but I wish to mention an obstacle that has presented itself to my mind against assenting to it. The defendant company has not raised any objection to the suit on the ground of want of parties, and I do not think that the court has the power to raise such an objection on the company's behalf, bearing in mind that this appeal is unaffected by the practice recently introduced under the new Judicature Act and rules. The defendant, William Pein, by his answer submitted that Herbert O'Hara Luth, Henry Luth's only child by his second wife, and also a general representative of Henry Luth, whose executors have not yet proved his will, were necessary parties The next-of-kin being the only persons who take beneficial interests under the will, I can understand why the presence of a representative has been dispensed with, notwithstanding that all the next-of-kin are required to be brought before the Court. But Pein, as trustee of the settlement, cannot, in my opinion, sustain his objection even as regards the next-of-kin. If the settlement is good against the plaintiff the bill must be dismissed. If it is void, Pein has no *locus standi*, and it is totally immaterial to him what becomes of the money sought to be recovered from the insurance company. The three infant defendants, children of Luth, the settlor, by his first wife, put in the usual infants' answer, submitting their interests to the protection of the Court. As beneficiaries entitled under the settlement they can no more complain of want of parties than Pein. But they are next-of-kin as well as Herbert O'Hara Luth, and, in fact, the only other next of kin. I conjecture that in our brother Molesworth's opinion the settlement may be bad, and that the infant defendants as next-of-kin have a possible interest in the sum assured which may defeat the plaintiff's right to recover from the company, but which their half brother is still more interested in asserting on his own behalf, and he has therefore decided that the half brother also should be brought before the Court. His interest, however, is distinctly adverse to that which the other next-of-kin, as beneficiaries under the settlement, are endeavouring to maintain. It can only be supported by destroying the settlement; and counsel for the infant defendants has requested us not to entertain the objection for want of parties, but to determine at once as between them and the plaintiff whether the settlement is good or bad. I have been much perplexed as to the duty of the appellate court under such circumstances, seeing that the claim of the absent infant, if any, could not be prejudiced by any decree made in a suit to which he was not a party.

(Before their Honors Mr. Justice Williams and Mr. Justice Helroyd.)

CLAXTON v. EVERINGHAM. Dec. 1.

"Wrongful conversion"—Pledge—Lien—Evidence of conversion—Inference of fact by Court-Acts inconsistent with plaintiff's ownership—Definition—To establish a conversion it is sufficient if a right of possession by the party aggrieved be shown, although that right may be subject to fulfilment of conditions.

Rule *nisi* to enter a verdict for the defendants.

DR. MADDEN and MR. HODGES moved the rule absolute; MR. PURVES, MR. FINLAYSON, and MR. BOX showed cause.

This action was brought by Mr. Claxton, as assignee of the estate of one Richard Elwood, to recover a sum of £6275, the value of certain sheep claimed to belong to the estate, and which had been converted by the defendants to their own use. The sheep had belonged to Mr. J. O. Inglis, and were sold by him to Thomas Elwood, on behalf of his brother, Richard Elwood. The sheep at the time of sale were in New South Wales. Before delivery

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was made Mr. Inglis required that Elwood's bill should be endorsed, and the defendants agreed to endorse it on condition that they received a mortgage on the sheep and a lien on the wool, which Elwood agreed to give. Before either security was given Elwood became insolvent, and the plaintiff was appointed his assignee. The defendants purported to sell the sheep to a person named M'Andrew, but the jury found that this sale was not genuine. They also found, in answer to a question, that Elwood agreed to give the mortgage over the sheep, and that the defendants were to retain them till the mortgage was given. A verdict was entered for the plaintiff for £6275, the value of the sheep. The jury also found that Elwood was indebted in a large sum to the defendants. On the finding of the jury the defendants applied to enter a verdict for them, on the ground that the sheep had been pledged to them till the mortgage was given, and that as it was not given they had a right to sell. The plaintiff contended that they were not pledgees, but merely held a lien over the sheep, and that as they had wrongfully sold the sheep they could not set off their debt against the value of the sheep.

Mr. Justice Williams said: This is an action brought by Mr. Claxton, as assignee of the insolvent estate of Richard Elwood, to recover damages for the wrongful conversion of a number of sheep. In the first count the sheep are said to be the property of Richard Elwood, and the second count alleges that they are the property of the assignee of the insolvent estate. The jury at the trial returned a verdict for the plaintiff, with damages £6275. They also gave answers to a number of questions put to them by the judge who presided at the trial, and upon those findings leave was reserved to the defendants to move to enter a verdict for them. It was also important to be borne in mind that leave was by consent reserved for the Court to draw inferences of fact. The rule *nisi* to enter a verdict for the defendants was obtained on the answer of the jury to the fourth question put to them, in which they found that there was an agreement between Thomas Elwood, who acted on behalf of Richard Elwood, that Synnot, Everingham, and Co., the defendants, should retain possession of the sheep until a mortgage over them was given. The defendants contend that that finding, taken in connection with the facts of the case, placed them in the position of pledgees of the sheep, and so gave them authority to sell if the condition on which the sheep were pledged was not fulfilled, namely, that they should receive a mortgage over the sheep. The main question is whether that contention is right, whether the defendants occupied the position of pledgees, or whether they were—as was contended for by the plaintiff—merely lienees. The facts were that the insolvent, Richard Elwood, had bought and dealt in stock, through the agency of his brother Thomas. He purchased through Thomas a large number of sheep from one Inglis. The purchaser required to be paid for the sheep, and it was arranged by Thos. Elwood on behalf of Richard, that the defendants should endorse the bill for the purchase. The defendants agreed to the arrangement, on the condition that he gave them security by giving a mortgage over the sheep and a lien on the wool. If that had been done, matters would have proceeded smoothly. But there was some difficulty about the mortgage, and it was then agreed that the defendants should get and hold possession of the sheep till the mortgage was given. These facts were plain, and gave great force to the argument, that the defendants were pledgees of the sheep. But, subsequently, two other facts took place, which threw quite a different complexion upon the capacity in which the defendants took and retained possession of the sheep, and they are important as showing the views of the parties themselves to the transaction. One fact was that the defendants after this applied for and obtained express authority to sell the sheep. It is obvious that if they were, and if they believed themselves to be, in possession of the sheep as pledgees, the taking of this authority was wholly unnecessary. The jury also found that a sale of the sheep by the defendants to M'Andrew was not genuine. The defendants took great care and exercised great ingenuity to effect a dummy sale, in trying to dispose of the sheep in such a way as to give a title to the sheep, and in purporting to sell as agent for the insolvent. That fact is perfectly inconsistent with their position as pledgees. These facts raised the presumption that they did not occupy the position of pledgees, and that they themselves did not believe they occupied that position. The defendants have also contended that there is no evidence of conversion by them—that there is no evidence of such exercise of domination over the sheep as would maintain an action for conversion. Having regard to the decision in *Hollin v. Fowler* (L. R. 7 E. & J. App. 180 and 184), I think there has been a conversion. It is stated in that case that in order to prove a conversion there must be evidence given of actual conversion, which consists in the defendant taking or using goods with the intent to exercise ownership on his own behalf or of someone other than the plaintiff, or a conversion by a refusal to deliver them on demand. In this case the defendants exercised acts inconsistent with the plaintiff's ownership. And if they are lienees, and have converted the sheep to their own use the decision in this court (*Osborne v. Synnott*, 7 V. L. R. 148) that where a lienee commits a tortious act he is responsible for the full value of the goods free from deduction of any debt, gives the plaintiff the right to retain the verdict for £6275 given to him by the jury. The rule to enter a verdict for defendant will, therefore, be discharged.

Mr. Justice Holroyd said: I concur with the

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jugdment that has been delivered, and it is only upon the question of conversion that I wish to say a few words. It is said in one of the old law lexicons that where a person finding or having in his possession the goods of another converts them to his own use without the consent of the owner, that is a conversion at Common Law. The definition is not quite wide enough if the words "to his own use" are literally understood; but whoever commits the particular tort so described is, in my opinion, guilty of a conversion. That is exactly the tort which Everingham committed. He went through the form of a sale, delivered the sheep to M'Andrew, and took delivery again from him, his intention being to convert the sheep to the use of his firm, an intention which he afterwards carried out by re-selling the sheep, not as agent for Richard Elwood, but ostensibly for M'Andrew, and really on his firm's account. By a fictitious sale he endeavoured to make his firm the owners of the chattels. The modern definition of conversion in the case cited has been equally well satisfied by what was done. The sheep were actually dealt with in a manner inconsistent with the rights of the owner, and with the intention of depriving him of his dominion over them. Where the dealing takes the form of a sale it is not necessary to constitute a conversion, that the sale should have been made to a genuine buyer. The act is just as inconsistent with the dominion of the true owner in the one case as in the other, and the wrongful intention is the same in both. To establish a conversion the party aggrieved must show in himself a right of possession; but by that is not meant an immediate right, or no lienee can be guilty of a conversion. A right to possession on fulfilment of conditions, as on giving a mortgage, is quite sufficient.

Rule discharged.

SOUTH AUSTRALIA.

LOCAL COURT.

(Before Mr. Commissioner Stuart.) Nov. 11.

PLAYFORD (COMMISSIONER OF RAILWAYS) *v.* THOMAS HARRY.

Railway bye-laws—Contract notice—Effect of passenger ticket. A ticket issued by a railway company to convey from A to B is not the contract between the purchaser of the ticket and the company; and a passenger who purchases a ticket is not bound by any conditions or regulations referred to on the ticket as in force without notice of the existence of such at the time the money for the journey was paid.

The facts are shortly as follows:—The defendant on the 6th September went to the Adelaide railway station and said: "I want to go to Mount Barker and back; how much?" He paid the price demanded and received a ticket separable into two parts; one half contained the words "S. A. R. (South Australian Railways), First excursion, Adelaide to Mount Barker, not transferable." On the other half were the words "Mount Barker to Adelaide," instead of "Adelaide to Mount Barker." The back of the ticket bore the date of issue. The defendant went to Mount Barker on a Saturday, and on returning on the following Tuesday objection was taken by the railway officials to the return half of his ticket, on the ground that "it was out of date;" there being a notice posted at all stations on this particular line that excursion tickets were available from Saturday to Monday only. The defendant in his evidence denied having seen the notice prior to the purchase of the ticket. The railway officials demanded payment of an excess fare, and on the defendant refusing to pay, the present proceedings were instituted to recover 2s. 2d., the amount of such excess.

MANN, Q.C., for the plaintiffs: The ticket is the contract (*Watkins v. Reginell*, L. R. Q. B. D., 1883, p. 178), and the words "first excursion," although ambiguous, put the passenger on enquiry, and impose upon him an obligation to make himself acquainted with the regulations of the company (*Zunz v. South Eastern Railway Co.*, L. R. 4 Q. B. 144; *Harris v. Great Western Co.*, L. R. 1 Q. B. D. 515).

HARRY (defendant in person): The ticket is not the contract (*Henderson v. Stephenson*, L. R. 2, Scotch Appeals, p. 470). The contract was complete as soon as the parties were *ad idem*. In this case the parties were *ad idem* when the booking clerk accepted the money for the journey to Mount Barker and back. The ticket was no part of the contract, but was only a memorandum of convenience to the parties contracting as evidence of a contract having been entered into. For instance, if I had lost my ticket, and I could show by other evidence than the production of the ticket itself that I had paid for the journey, could it be said that I would have to pay again? If the ticket was the contract, and it contained ambiguous words, they would be construed most strictly against the company.

Nov. 13.

HIS HONOR now delivered reserved judgment as follows: The plaintiff claims in this case the sum of 2s. 2d., excess fare, from the defendant, under the following circumstances:—On the 6th September the defendant went to the ticket office at Adelaide, of the Government Railways, and said "I want to go to Mount Barker and back; how much?" He paid the price demanded, and received a ticket separable into two parts by a perforated line, each half of the ticket bearing the words "First excursion," one half bearing the words "Adelaide to Mount Barker," the other half the words "Mount Barker to Adelaide." On the Tuesday following he entered a carriage of a train about to depart from Mount Barker, and on being requested by the stationmaster to show his ticket produced the half ticket marked "First excursion, Mount Barker to Adelaide." He was thereupon requested to pay either an excess, or an additional

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fare, and on his refusing either to pay further fare, or to leave the carriage, he was permitted to proceed on his journey. On arriving at Mitcham, the station used for the collection of tickets prior to entering the city, he again tendered to the collecting guard the same ticket. He was informed that the ticket having expired on the previous day, was insufficient, and a demand of 4s. 4d., a full fare from Mount Barker to Adelaide, was made upon him. This he refused to pay, and hence these proceedings. The defendant on his return from Mount Barker made some enquiries at the ticket office as to the duration of excursion or return tickets, and, in company with one of the clerks searched the notice-boards at the station for information, but failed to find anything bearing on the subject. He states also that after his return he was informed on enquiry that the duration of a return ticket was dependent on the distance of the place whither the passenger desired to go. The plaintiff bases his right to demand additional fare on the following grounds:—1. That the ticket is the contract. 2. That on the face of the ticket is a condition, viz., the words "first excursion." 3. That while admitting that the words "first excursion" are ambiguous, yet they put the passenger on enquiry and impose an obligation on him to enquire further. 4. That had he enquired, or had he examined the notice-board, he would have discovered that the return ticket was restricted in its operation, and was not available after the Monday following its date of issue. 5. That the insertion of the words "first excursion," coupled with the alleged obligation to enquire into their meaning, operated as an express condition, to which the defendant must be taken to have intelligently assented, so as to operate by way of limitation of the contract to carry on a return journey within a reasonable time. Assuming that the alleged obligation to enquire and to examine time-tables existed, the plaintiff adduced evidence with a view of raising as against the defendant an irresistible presumption that time-tables affording all necessary information were placed on the notice-board at the station. Several time-tables were shown to the defendant on his cross-examination; but although a time-table giving some information as to excursion trains were found on the notice-board by others on the Tuesday referred to, still, singularly enough, the person whose duty it was to place the tables on the notice-board was not called, and everything was left to mere inference. Numerous cases bearing on conditions limiting the responsibility at Common Law of carriers and bailees were cited in the course of the argument. I confess that as to some of them, although highly interesting and instructive from a legal point of view, they appear to me to have but little bearing on the case under discussion. With the exception of one they are all cases of bailment, and as regards the excepted case it was an action for an injury to a passenger while travelling with an English company's coupon on a French line. In each of the bailment cases the question is whether express and unambiguous conditions limiting the common law liability of the depositee, and contained either on the ticket itself or by unambiguous reference to some bill or other document, are to be taken to have been assented to by the bailor at the time of receiving his ticket in such a way as to bind him in contract of more limited operation than the Common Law would impose. Several of the judgments in these cases turn upon the admissions made by the persons taking the ticket upon the inference of fact drawn by the court itself, and upon the particular nature of the transaction. Take the case, for instance, of *Watkins v. Rymill*, in 1883 (L. R. Q. B. D., p. 178). There a person took a waggonette to a repository for sale, and received a receipt followed by the words "subject to the conditions exhibited on the premises." By one of these conditions the keeper of the repository had power to sell any property remaining there over a month unless all expenses were paid previously. The judgment in favour of the keeper of the repository, who had sold the waggonette, was based principally on the nature of the transaction.

STEPHEN, J., in his judgment, says: "Can it be said that the nature of the transaction was such that the plaintiff might suppose, not unreasonably, that the document contained no terms at all, but was a mere acknowledgment of agreement not intended to be varied by special terms? It seems to us impossible to suppose that this can have been the case. The acceptance of a carriage for sale on commission is not a simple contract, the terms of which are established by the Common Law, in the absence of any special agreement by the parties. They must, from the nature of the case, be as special as those of a contract or lease, or a bill of lading, and this consideration alone seems to us to establish the conclusion that the receipt and conditions to which it refers constituted the contract between the parties." The decision thus resting upon the presumption arising from the very nature of the contract itself, that the person depositing must expect some conditions to be attached to the bailment. I refer to this case in particular, because nearly all the authorities referred to in the argument before me are discussed and considered in the judgment, and because clear and well-defined propositions are laid down respecting exceptions to the ordinary rule of law, that a person is presumed to have accepted the terms contained in a written or printed contract or ticket. These exceptions are so stated:—1. In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms. 2. A second exception would be the case of fraud, as if the

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conditions were printed in such a manner as to mislead the persons accepting the document. 3. A third exception occurs if, without being fraudulent, the document is misleading, and does actually mislead the person who has taken it. Take next the case of *Henderson v. Stephenson*, L. R. (II.), Scotch Appeals, p. 470. That was a case arising out of the loss of a passenger's luggage (another branch of the law of bailments), and the carrying company sought to escape the Common Law liability by placing on the back of the ticket a condition that they would not be liable for the loss of passengers' luggage. The law lords, hearing the appeal, decided against the company, and in the course of the case both Lord Chelmsford and Lord Hatherly seemed to consider that in the absence of express notice to, and assent by the passenger to the conditions on the ticket, the contract to carry safely was complete on the payment of the money, the ticket itself being a mere voucher evidencing the making of the contract. In that case, also, the authority of *Zunz v. South Eastern Railway Co.*, L. R. 4 Q. B. 144, was much questioned. In the later case of *Harris v. Great Western Railway Co.*, L. R. 1 Q. B. D., p. 515, the judges were inclined to treat the judgment of their lordships on this point as merely *dicta*, but admitted that such *dicta* might be taken to be absolute law as regards a passenger going by a public conveyance. While referring to the case of Harris *(supra)*, I must point out that Harris himself admitted on examination that "he had received similar tickets before; that he believed there were some conditions, but that he never gave it a thought." The weight of authority, therefore, on the question whether the ticket was the contract impels me to the conclusion that under the circumstances of the present case the ticket is not the contract. What are the circumstances under which it is obtained? The defendant has paid his money. The ticket clerk who took it has made a contract, which, according to the case of *Pickford v. The Grand Junction Railway Company*, must be taken to be within the scope of his authority; and the defendant neither troubles himself further about the matter, nor is he under any obligation to do so. What circumstances can come more pointedly within the first proposition, which I have extracted from *Watkins v Rymill (supra)*? To which I might safely add that it is a matter of common everyday knowledge that railway tickets are used as a voucher of payment, and is a check for the information of guards and stationmasters and are collected before the termination of the journey. Such uses are not perfectly consistent with the mode of dealing with contracts in writing. Lest, however, in the absence of any other authorities, I may have erroneously held that the ticket is not the contract, I must now apply myself to the question whether, assuming the ticket to be binding as a contract, the defendant is liable. Are the words "first excurrion" a condition? Are they a condition as to time, or as to train? Are they a mere permission to go by a particular train, or an obligation? Do they mean the first excursion train after the ticket is issued, or do they mean a train by which excursionists are permitted to travel? What is contended for by the plaintiff is, that they mean that the defendant is to go and look for a time-table, or a bye-law, or a regulations crowded in in very small print on some placard. That he is to read everything in the station, else he will be taken to have assented to everything on the notice-boards, and in the time-bills relating to return by excursion trains. Common sense and common justice would scarcely interpret these words into so gross an absurdity. In *Van Toll v. South Eastern Railway Co.*, 12 C. B. N. S. 88, Justice Boyle says: "I do not think it is enough that the conditions are printed; they must not only be reasonable and intelligible, but plain and obvious, plain and obvious both in the language and in the writing or printing by which they are conveyed." And in *Butler v. Heane & Co. (supra)*, 415, Lord Ellenborough said: "The jury ought to believe that the plaintiff had ample means of seeing the terms on which the defendants carried on their business of carriers." These authorities alone are sufficient to show that in the absence of express notice or actual knowledge and assent, the defendant in the present case is not bound. Even if the time-bill which was produced at the trial was as a fact upon the notice-board on the day on which the ticket was taken, is it reasonable to suppose that that was sufficient notice? Is a passenger, in addition to paying his fare, under any obligation before entering a train to await his turn in the midst of a crush of other persons opposite to a time-bill, having a superficies of about two square feet, and take his chance of seeing on this bill in small print what "first excursion" means? Such knowledge or assent are absolutely negatived by the testimony of the defendant. To call the words "first excursion" a condition is to my mind a complete misnomer, and for this reason, as I have already said, the cases in the books on the subject of conditions have no application. Besides in law a condition limiting the Common Law contract to carry will be limited, and not extended as regards the person imposing it. It must be certain in its terms, and reasonably capable of being made certain by a person of ordinary understanding. But it may be said "first excursion" must to a man of ordinary intelligence lead to enquiry as to the duration of the excursion. It may be said that the word excursion imports in itself an early return. I answer this by saying that even if it does so import, a return on Tuesday instead of on Monday is not so material a difference in time as to make the return on Tuesday any less reasonable than a return on Monday. It is no argument that the passenger is carried at lower

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rates than if he had only taken single tickets each way. The authorities give return tickets at reduced rates to induce persons to travel who would not otherwise do so, but having once agreed with the clerk to be carried to Mount Barker and back the defendant was entitled, in the absence of any notice or assent otherwise on his part, to be re-conveyed for the money he has paid.

SUPREME COURT.

IN BANCO.

Nov. 28.

KIRKPATRICK v. SOUTH AUSTRALIAN INSURANCE COMPANY LIMITED.

Policy of insurance—Renewal of policy—Appropriation of payments—The plaintiff, who was a merchant, and also acted as a local agent of the defendants, insured his stock and premiums under three policies (two on the stock-in-trade, Nos. 28,610 *and* 28,611, *and the other on a building known as "Store K," No.* 28,253*), all of which expired on December* 1*st*, 1882. *On November* 22*nd*, 1882, *the defendants wrote to the plaintiff informing him that the policies expired on December* 1*st, and again on the* 6*th, that they had lapsed. On December* 21*st the defendants telegraphed, "Are you not renewing policies due December* 1*st, Store K?" The plaintiff telegraphed on* 23*rd, "Apply National Bank for amount of premium,* 28,253." *This amount was received and accepted. On December* 23*rd the defendants telegraphed, "Policies* 28,610 *and* 11 *also lapsed." Receiving no reply, the defendants telegraphed on December* 27*th, "Are you renewing* 28,610 *and* 11?" *and on* 2*nd January they wired, "Please reply immediately our telegrams* 13*th*, 16*th*, 23*rd*, 27*th December; wire amount premiums." On January* 3*rd they wrote reprimanding the plaintiff for want of promptness. On Saturday, January* 13*th, the plaintiff received the letter of* 3*rd January, and wired, "The whole of the premiums will be wired to you Monday first." The premiums were not remitted, and the telegram escaped notice in the defendants' office. On January* 18*th the defendants wrote that the plaintiff would not be held covered until they received the amount of the premiums. Before the receipt of this letter by the plaintiff, the plaintiff, on January* 5*th, wired, "£*100 *your credit Bank of South Australia, for premiums." (To this was added a proposal for a new risk.) On January* 26*th, £*100 *was received by the defendants, and receipt signed for that sum on "account premiums." On that date there were due to defendants for premiums from the plaintiff, partly on his own account and partly as agent, £*70, *including policies* 28,610 *and* 28,611. *On February* 2*nd, Store K and its contents were destroyed by fire. On action to recover the amount of policies* 28,610 *and* 11, held, *that under the above circumstances there was no appropriation sufficient to entitle the plaintiff to succeed.*

The facts will be found in the judgment.

WAY, C. J., delivered the judgment of the Court as follows: This is an action to enforce an alleged contract for renewal of two fire insurance policies. The plaintiff is a merchant carrying on business at Bourke, in New South Wales, where he also acted as the local agent for the defendants, whose head office is in Adelaide. The stock and premises of the plaintiff were covered by several fire policies granted by the defendants, of which those in dispute are numbered 28,610 and 28,611, which for shortness may be called 10 and 11. They covered the stock-in-trade in a store marked K in the applications for these policies in the sums of £1500 and £3,000 respectively. The building known as Store K was covered by another policy for £2000, numbered 28,253. All three policies expired on the 1st December, 1882, and were renewable on payment of the annual premiums on or before that date. The defendants sent to the plaintiffs, through the post, a printed notice as to each policy on November 22, that they expired on December 1st, and on 6th December that it had lapsed on the 1st, and that unless the premium were paid any loss that might be sustained could not be recovered. On December 21st the defendants telegraphed to the plaintiffs, "Are you not renewing policies due 1st December, Store K." The plaintiffs replied by a telegram on the 23rd, "Apply National Bank for amount of premium, policy 28253. Confirm." This amount was received and acknowledged by telegraph on the 26th. On December 23rd the defendants again telegraphed, "Policies 28,610 and 11 also lapsed December 1st." Receiving no reply they sent the following telegrams to the plaintiffs on 27th December:—"Are you renewing 28,610 and 11 for £1500 and £3000, stock in K, due 1st December. Reply." And on January 2, 1883, "Please reply immediately telegrams 13th, 16th, 23rd, 27th December. Wire amount premiums." On January 3rd, Mr. DeCean, a clerk in the defendants' office, who attended to the correspondence with the plaintiffs, wrote a letter setting out the above telegrams, and telegrams in two other matters not material to this case, and concluding with the following passage:—"Please note that nearly all your business we have to effect re-insurances with offices here. It is necessary that when you wire us to cover any building or stock that you at once take the proposal and post it to this office, and in the case of renewals that the premiums should be at once remitted. It is now over one month since your policies, 28,610-11, fell due, and as the bulk of these policies are re-insured, and the offices will not extend covers for one month, you will see how necessary it is that you should have replied to my telegrams of 23rd and 27th December. I may also mention that as we only get a small allowance from some of the

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offices for the re-insurance business it is nearly all absorbed by the Telegraph Department, and it would be advisable to refrain from having to ask for information twice over, as has been necessary in the above case." This letter, according to the course of post, would arrive at Bourke at six o'clock in the evening of Saturday, Jan. 13, and at half-past eight on the same evening a telegram was despatched by some one on behalf of the plaintiffs to the defendants, which would be delivered at their office on the following Monday, in these words—"The whole of the premiums will be wired to you Monday first." This telegram was probably sent by one of two clerks who had charge of the plaintiff's insurance business, one of whom was dismissed on the Monday, and the other of whom resigned in March. Mr. Murray, the only member of the plaintiffs' firm who resided at Bourke, or who took any part in the management of the business there, seems either to have been absent or not giving any attention to the insurance matters at that time. The premiums were not remitted as promised by the telegram of the 13th, and this telegram escaped notice in the defendants' office—probably in consequence of the illness of Mr. DeCean. On January 18 Mr. Tapley, the defendants' secretary, addressed a letter to the plaintiffs, informing them that until they wired amounts to be insured they would not be held covered. On the 25th January (and before Mr. Tapley's letter of the 18th could be received at Bourke) Mr. Murray's attention was called to the letter of January 3, and he despatched the following telegram to the defendants: "One hundred pounds, your credit Bank of South Australia, for premiums." (To this was added a proposal for a new risk.) On January 26th, the bank paid the £100 to the defendants, and a receipt was signed by their secretary for that sum "on account premiums." On that date there were due to the defendants for premiums from the plaintiffs, partly on their own account, and partly as agents, £41 17s. 9d., exclusive of the policies 10 and 11, or if they are reckoned £70 0s. 3d. On February 2 Store K. and its contents were destroyed by fire. The plaintiffs insist, and the defendants deny, that the payment and receipt of the £100 on January 26th operated as a renewal of policies 10 and 11. At the trial I agreed with the plaintiffs, and (there being no dispute as to value) directed judgment in their favour for £4,500 and interest. Against that judgment the defendants have appealed. It must be admitted that, as I said at the trial, if the plaintiffs fail they deserve to do so for their inattention to their business, and if they succeed the case is a hard one for the defendants. The plaintiffs were warned again and again by circular and by telegram that their policies were overdue. When they singled out the policy on the store alone for renewal the defendants sent three more telegrams enquiring if the stock was not to be covered also, and a letter repeating the telegrams. The plaintiffs, at last, awakened to the necessity of doing something to protect the stock, sent a remittance, with a message which, whatever its legal effect may be, did not say (as it might as readily have said) in express terms, that the policies which had lapsed six weeks before were to be renewed. With the letter of January 3rd before him, stating that the defendants were in the habit of re-insuring nearly all their risks, Mr. Murray did not trouble to send the particulars which he had made to be forwarded of the premiums to which he wished the remittance of £100 to be applied, and which were asked for by that letter. If he had sent these particulars the defendants would have known what was required, and could have divided their risk under policies 10 and 11 with other offices before the loss. It must also be conceded that a contract of some kind was effected between the parties by payment and receipt of the £100 which accompanied the telegram of January 25th. The telegram is the proposal, and the receipt of the money its acceptance. If the plaintiffs on the one side did not express what they meant by their proposal, or if the defendants on the other side did not trouble to understand the proposal which they accepted, they must in either case take the consequence of their carelessness. The question in dispute, therefore, resolves itself into the meaning of the telegram of January 25th. Was it a proposal to renew policies 10 and 11, or was it simply a proposal to pay £100 to the plaintiffs' credit on "premium" account with the defendants? Mr. Murray tells us with respect to this telegram, "when I made discovery that 10 and 11 were unpaid I sent the £100 away in a hurry." "On the 25th I discovered a letter of 3rd January and one or two telegrams." "It was in consequence of that letter and the telegrams that I remitted the £100." "On the 25th January I knew 10 and 11 in peril, and suspected there were more. I didn't remit exactly because I hadn't time to ascertain the other amounts that were due. I wasn't sure there might not be insurances not named in that letter. I intended to investigate what was due and did so. When I found out what was due I intended to inform the company of the particulars to which the money was to be applied. I never did so. I made out a list but never posted it to the company." Disregarding for the present the telegram of 13th January, can it be said that the telegram of the 25th communicated to the defendants a proposal to renew policies 10 and 11? The words of the telegram were, "One hundred pounds, your credit Bank of South Australia, for premiums." These words, by themselves, or even if read with the rest of the correspondence leaving out the telegram of the 13th January, with which I shall presently deal, would certainly not inform the defendants that the plaintiffs desired to renew policies 10 and 11. I have already pointed out these policies had lapsed six weeks before, and nothing was due upon them. Supposing the plaintiffs had not wished to renew,

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and had been debited with the premiums on policies 10 and 11, how could the defendants justify charging the premiums to the plaintiffs. The plaintiffs' reply would be unanswerable, "You have asked us again and again if we wished to renew, and we have never assented to so doing?" But the plaintiffs say that the telegrams and letters also set out must be read as a dialogue leading up to what was done on the 26th. To this I assent with the qualifications that the intervals of time between questions and answers must not be overlooked. And although the point is not material to the determination of the case it appears to me that the telegram of January 13th must be rejected as forming no part of the negotiation in the minds of either party when the £100 was paid. This telegram was not sent by Mr. Murray, and does not seem to have come to his knowledge "when he discovered the letter of the 3rd of January and one or two telegrams," and despatched the telegram of January 25th. Nor had it been seen by Mr. Tapley when he received that telegram or the £100. I do not think, therefore, that the telegram of January 13th is admissible as interpreting what was meant by the senders and recipients of the telegram of January 25th. But, granting that a knowledge of the telegram of the 13th January must be attributed to the defendants when they received the £100, the case is not altered. The telegram of the 13th was a reply to the letter of January 3rd, and informed the plaintiffs that the whole of the premiums would be wired to them "Monday first." I agree that "premiums" here included these overdue on policies 10 and 11. When Tuesday came without the premiums being wired, the defendants had notice that the intentions to renew policies 10 and 11 expressed on Saturday had been changed by Monday. I can discover no intimation of a second change of intentions even when I read the telegrams of the 13th and 25th together. The first telegram says the whole of the premiums will be wired on Monday; the second advises remittance of £100 "for premiums." The amount sent was not the same as the whole of the premiums, it was not sent on the Monday indicated but ten days after, and it was not for "*the whole* of the premiums" but for "premiums" simply—the appropriation of which was apparently deferred for subsequent advice, I am, therefore, of opinion that a proposal to renew the policies in question was not communicated by the plaintiffs to the defendants and that the judgment for the plaintiffs must be reversed and entered in the defendants' favor.

VICTORIA.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

NATHAN v. TURNBULL. Nov 20.

Rules of Supreme Court 1884, *Order III., r.* 6, *Appendix C., sec. IV—Specially endorsed writ-Cheque—Where a writ is intended to be specially endorsed in an action by the holder of a cheque against the drawer, the endorsement should contain an affirmation that the cheque was presented for payment, and was dishonoured.*

Application on behalf of the defendant calling upon the plaintiff to show cause why a judgment, signed by the plaintiff for want of defence, should not be set aside, and why the proceedings taken by the plaintiff to tax his costs of such judgment should not be stayed pending the return of this summons on the grounds: That previously to signing judgment the plaintiff did not deliver to the defendant a proper statement of claim, nor obtain leave to sign final judgment. That the plaintiff signed the said judgment after appearance has been entered, pursuant to the order of a judge. And that the defendant would be deprived of his defence to this action if the plaintiff's costs were taxed and execution issued on the master's allocatur.

The writ purported to be a specially endorsed writ under Order III., r. 6. The endorsement was as follows:—

"The plaintiff claims £220 principal due to him as the holder of a banker's cheque or promissory note, of which the following is a copy:—

Bank of N. S. Wales

No. 365995.

The Bank of Victoria,
Melbourne,
18th Sept., 1884.

Pay Mr. J. Thompson or order two hundred and twenty pounds (£220 0s. 0d.)

A. J. TURNBULL.

Endorsed { JOHN THOMPSON.
GEO. HYNARD."

It was contended on behalf of the defendant that as the action was by the holder of a cheque against the drawer that this endorsement was not sufficient to constitute the writ a specially endorsed one. The holder was entitled to notice of dishonor. The writ should have shown that the cheque was presented for payment and had been dishonored (Appendix C., sec. IV., No. 5). The defendant, on the receipt of a proper statement, would have delivered his statement of defence and defended the action.

MR. ISAACS for the plaintiff.

HIS HONOR said: The question in this case is whether the writ is a specially endorsed one under the rules. This action is brought by the holder of a cheque against the drawer. By the forms of special endorsement given in Appendix C., sec. IV., the drawer of a bill of exchange is entitled to notice of dishonor. A cheque is only an accepted bill of exchange, and the maker is entitled to notice of

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dishonor. This statement does not contain the affirmation that the cheque was presented and dishonored, which it ought to do; consequently I think the writ in this case was not a specially endorsed writ, and the plaintiff ought to have delivered a statement of claim; as he was required to do by notice from the defendant. I allow the summons with costs.

Solicitors: For plaintiff, *Nathan*; for defendant, *Woolf*.

(Before His Honor Mr. Justice Williams.)

ETTERSHANK v. RUSSELL. Dec. 4, 5.

Judicature Act 1883 (*No.* 761), *sec.* 9, *sub-sec.* 8 —*Rules of Supreme Court* 1884, *Order L, r.* 6; *Order LIV., r.* 1—*Equitable execution—Appointment of a receiver—Application for the appointment of a receiver may be made on summons to a judge in Chambers—Before granting equitable execution the Court or a judge must be satisfied that the plaintiff has tried all he could to get satisfaction at law within the colony.*

Application on behalf of the plaintiff under sec. 9, sub-sec. 8 of "The Judicature Act" for the appointment of a receiver.

MR. TAYLOR, for the defendant, took the preliminary objection, that an application of this nature, if not made *ex parte*, must be made to the Court and not in Chambers. The words "with notice" in Order L., Rule 6, mean that it should be made to the Court, and in that case the defendant should have had two clear days' notice.

It was contended, on behalf of the plaintiff, that the words "with notice" apply to a judge sitting in Chambers as well as to the Court. The cases of *Smith v. Cowell* (6 Q. B. D. 75) and *Fuggle v. Bland* (11 Q. B. D. 711) show that an application of this nature can be made in Chambers.

MR. TAYLOR, in reply: The cases cited were made *ex parte* and not on notice. The English practice shows that such applications can be made *ex parte* if urgent.

HIS HONOR said: I have considered the matter, and I think that the rules are a little inconsistent. Order LIV., Rule 1, says that all applications that are made in Chambers shall be made on summons; Order L., Rule 6, says that in certain matters the application may be made to the Court or a judge. If the words, "with notice," applies only to notice to the Court yet the words, "may be made," show that it may be made *ex parte* and in Chambers. If it may be made in Chambers it may be made on summons. I will hear the parties on the merits.

MR. TAYLOR: Sec. 9, sub-sec. 10, of the Judicature Act says that an application for a receiver is to be granted only where it shall appear to be "just or convenient." It has been ruled that the word "or" is to be read as "and." The plaintiff must have tried to have obtained satisfaction at law for his debt before he can resort to a proceeding of this kind (*Salt v. Cooper*, 16 C. D. 544). The affidavits show that the plaintiff is possessed of property in New South Wales. The plaintiff ought to have registered his judgment in Sydney, and so obtain satisfaction for his debt. The plaintiff has not exhausted all his remedies at all.

It was urged on behalf of the plaintiff that as a writ of *fi. fa.* had been issued, and had been returned by the sheriff *nulla bona*, such return is conclusive evidence that the ordinary process of the Court is unattainable. The plaintiff has only to show that there are no goods or chattels in the bailiwick, which he has done. The plaintiff could not levy in New South Wales, as his interest is an equitable one.

HIS HONOR said: This was a summons taken out before me under sec. 9, sub-sec. 10, of the Judicature Act for equitable execution by appointing a receiver. The principle on which such an application is allowed is stated in the case of *Salt v. Cooper* (16 C. D. 544). Before granting an application of the kind the Court or a judge must be satisfied that the plaintiff has tried all be could to get satisfaction at law. In this case the plaintiff issued a *fi. fa.*, and it was returned *nulla bona*. It was contended, on behalf of the defendant, that the plaintiff ought to have issued execution in New South Wales. I think, however, that the plaintiff has only to do all that he can to get satisfaction of his judgment in Victoria. I decide this question on the ground that the plaintiff has done all that he can to get execution. I allow the summons and refer to the officer to appoint a receiver. The defendant to pay the costs of this application.

Solicitors: For plaintiff, *Crisp, Lewis* and *Hedderwick*; for defendant, *G. H. Taylor*.

(Before His Honor Mr. Justice Higinbotham.)

PATERSON v. LUKE. Dec. 10.

Common Law Procedure Statute 1865 (*No.* 274), *sec.* 22—*Change of venue—Convenience—Where an application is made after a trial in which the jury have disagreed to change the venue of the second trial, very strong ground for the desirability of the change should be shown—If there are reasons making it undesirable that the second trial should be held in the same place as the previous one these reasons should be stated.*

Application on behalf of the plaintiff calling upon the defendant to show cause why the plaintiff should not be at liberty to amend the declaration by altering the venue from the eastern bailiwick to the central bailiwick, and by adding the names of certain persons who would have dealt with the plaintiff, but refused, and declined to deal with or transact business with him in his business.

DR. MADDEN, in support of the application: The action was one for libel, and was tried at Sale, but the jury disagreed. The plaintiff has the carriage of the action, and was the only person who called witnesses at the trial. A great number of the plaintiff's witnesses reside in Melbourne, and the

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plaintiff states that it would be more convenient and less expensive to bring his witnesses, who live in or about Sale, down to Melbourne than to bring his Melbourne witnesses and counsel down to Sale.

MR. BOX, to oppose: The defendant does not object to the names of the persons asked for being added. This is an application by the plaintiff. He originally had the carriage of the action, and he laid the venue at Sale, and now, because he was unsuccessful, he wants to have the action brought to Melbourne. The trial can take place earlier at Sale than at Melbourne. Nearly all the witnesses reside at Sale, the cause of action arose at Sale, the plaintiff was formerly residing at Sale, and the witnesses whom the plaintiff proposes to add to the declaration all reside at or near Sale. The only argument is that it would cost more to bring counsel to Sale than to bring the witnesses to Melbourne. The defendant did not call witnesses at the previous trial, but he had persons there, all residents of Sale, to give evidence if counsel had thought it expedient to call them, and there is nothing to prevent him calling them at the next trial.

HIS HONOR said: I do not think the plaintiff has shown sufficient grounds to justify me in ordering that the venue should be changed on the ground of convenience. The question presents itself in a different light after the trial than before it. If, for other reasons, it is desired that the second trial should not be held in the same place as the previous one these reasons should be stated. On the ground of convenience there would be very little difference, so far as I can judge, between both parties, and on that ground I do not think I should grant the application without very strong grounds being shown for my doing so, which has not been done in this case. Summons allowed as to the insertion of the additional names. Summons dismissed as to the change of venue. Plaintiff to pay the costs of this application and of the amendment, which I fix, by consent, at four guineas. I certify for counsel.

Solicitors: For the plaintiff, *Vaughan* and *Derham*; for the defendant, *R. H. Smith.*

REG. v. ROBINSON. Dec. 12.

Capias ad satisfaciendum—*A writ of* capias ad satisfaciendum *is merely a writ of the Supreme Court of the Colony of Victoria, and such has authority only within the limits of the colony.*

Application by the Crown Law Department for a writ of *capias ad satisfaciendum* against Robinson on his estreated recognisance. Robinson was tried at the Central Criminal Sittings in March, 1884, and was convicted. Certain points of law were reserved for the consideration of the Full Court, and Robinson was allowed on bail pending the decision of the Full Court on these points. He absconded from his bail, and his recognisance was estreated. It was believed that he was in Sydney, and the present application was made for the purpose of enabling the police authorities to re-arrest him.

HIS HONOR said: This is an application for a writ of *capias ad satisfaciendum* to arrest one, Robinson. It was stated, and properly stated, that the purpose of this application was to endeavour to obtain the arrest of Robinson, who was a prisoner who had absconded from his bail, and who was belived to be in Sydney. A writ of *capias ad satisfaciendum* does not run into another country, and if it were issued it could not be acted upon in another colony, nor would an arrest under it be lawful. It is merely a writ of the Court, and, as such, has authority only within the limits of this colony. It is intended to use it in an unauthorised way, and I must refuse the application.

PRACTICE COURT.

(Before His Honor Mr. Justice Williams.)

Dec. 6.

REG. v. DREVERMANN, *ex parte* WATSON.

Local Government Act 1874 (*No.* 506), *secs.* 54-71 —*Application to oust—Candidate concerned in a contract with the municipality—Disqualification—A candidate who holds a lease of certain lands from the municipality at a fixed rent is incapable of being or continuing a councillor of the municipality under sec.* 54 *of Act No.* 506.

Order *nisi* to oust one F. W. Drevermann from the office of councillor of the East Riding of the Shire of Bairnsdale.

MR. HODGES to show cause. Application under sec. 71 of the Local Government Act. Drevermann and Watson were both nominated to fill a vacancy in the council. The election took place on the 14th August, 1884, and Drevermann was declared duly elected on the 20th August. He resigned on the 15th September. On the 20th September gave notice that an extraordinary vacancy had taken place in the council by the retirement of Drevermann. On the 22nd of September Watson gave notice to the returning officer that he claimed to be duly elected under the election of the 14th August, as being the only candidate nominated who could be returned. Drevermann was the only candidate nominated for the extraordinary vacancy, and he was declared duly elected on the 27th September. The ground upon which it was said that Drevermann was not properly elected on the first occasion was that he had an agreement with the council by which he leased certain lands. This is said to be a violation of sec. 54 of the Local Government Act. This agreement was assigned with the consent of the council before his second nomination, but after the first election. It will be contended that the mere fact of the existence of the contract renders Drevermann unfit to be elected. I submit

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that a contract of this nature is not of the kind contemplated by the legislature. The contract was a lease of certain land for seven years, under which Drevermann was to pay to the council three guineas a year. He is not participating, and so is not disqualified from acting as councillor. There are no profits here. The section does not say, "concerned in any contract," but "participating in the profit of any contract." Drevermann never participated in the profit of any contract with the council. Assuming that he was not qualified at the time of the first election he was no doubt duly elected on the second. A candidate is not elected by receiving a number of votes. Sec. 135 of the Act provides that "the returning officer shall declare a person duly elected," and sec. 120, "shall be declared elected," so that there must be a declaration, and until that declaration takes place a candidate is not duly elected. The mere fact of Watson demanding to be declared duly elected does not make him a councillor. He would have to be declared so, and no such declaration has ever been made.

SIR BRYAN O'LOGHLEN: Whether the second election was a valid one or not would depend on whether Drevermann had anything to resign after the first election. Drevermann never subscribed the declaration or took his seat after the first election, and so had nothing to resign (*Reg. v. Percy, ex parte Watson*, 2 A. J. R. 122; 3 A. J. R. 29). When the returning officer found out that Drevermann was disqualified for the first election he should have declared Watson to be duly elected. If Drevermann had nothing to resign no vacancy would have been made, and so he could not be elected on the second occasion. Sec. 54 of the Act provides that "no person concerned in the profit in or of any contract with any municipality shall be capable of being or continuing a councillor of the municipality." Drevermann had a contract with the municipality, and the Court will not inquire whether the profit will be large or small (*Reg. v. Lowell, ex parte Gwyther*, 2 A. J. R. 55; *Simpson v. Ready*, 12 M. & W. 736). Drevermann's contract was clearly a contract of profit, and he being incapable of being elected on the first occasion, the returning officer should have declared Watson duly elected and should not have held the second election.

HIS HONOR said: An ordinary vacancy in the office of councillor for the East Riding of the Shire of Bairnsdale was, on the 14th August of the present year, created by the retirement in rotation of a councillor, and for the vacancy so created the person now sought to be ousted, Frederick William Drevermann, and the applicant, were nominated as candidates. An election was held, at which Drevermann obtained the larger number of votes, and was on the 20th August declared by the returning officer to be duly elected to fill the ordinary vacancy. Drevermann, however, never made or signed the declaration mentioned in sec. 55 of the Local Government Act 1874, nor did he ever, under under this election take his seat, or in any way act as councillor. Drevermann, therefore, according to the authorities, never became *de facto* a councillor (*The Queen v. Robinson*, 1 V. L. R. (L.) 50; *Rice v. Lisle*, 2 S. 1,090; *Reg v. Quayle*, 11 A. & E., p. 508). It was also contended for the applicant that Drevermann was not entitled *de jure* to be considered a councillor, as he was disqualified by virtue of the provisions of sec. 54 of the Local Government Act through his having entered into a contract with the council of the shire to lease certain lands from them at a fixed rent, for the term of seven years, subject to certain covenants and conditions contained in the lease. This lease had been entered into before his nomination as a candidate, and continued in existence after his nomination, and after the declaration by the returning officer. I am of opinion on the facts as stated, and having regard to the terms of the lease, that Drevermann was disqualified (*The Queen v. Lowell*, 2 A. J. R., p. 55; *Simpson v. Ready*, 12 M. & W., p. 736). Questions might, and probably would, arise under the lease as to whether covenants had been broken as to forfeitures and waiver of forfeitures. These questions would, in the ordinary course, come before the council, and the lessee as councillor might insist upon his right as such to take part in the consideration and determination of these questions. Drevermann, therefore, in my opinion, never became a councillor either *de facto* or *de jure*. This being the state of things on the 15th September, Drevermann endeavoured, by letter to the returning officer, to resign his office. The returning officer accepted the resignation, held that an extraordinary vacancy was thereby created, and proceeded to hold an extraordinary election to fill such extraordinary vacancy. The present applicant protested against this, but the returning officer held the election, for which Drevermann was the only candidate, and declared him duly elected. Drevermann, thereupon, took the necessary declaration, and acted, and continued to act, as councillor. It is contended on these facts that there was no extraordinary vacancy; that, therefore, there could be no extraordinary election held, and that Drevermann should be ousted from acting as councillor by virtue of that election. I think this contention also should prevail. Drevermann, on the 15th September, had nothing to resign (*The Queen v. Percy, ex parte Watson*, 2 A. J. R., p. 122; and the same case in 3 A. J. R., p. 29; also, *The Queen v. Robinson*, 1 V. L. R. (L.) 50), and if he had nothing to resign there was no extraordinary vacancy, and the election held to fill a vacancy which did not exist would be void. Drevermann is, therefore, acting as councillor under an election which is invalid, and he must be ousted from his *de facto* position as councillor. I, therefore, make the order to oust absolute, with costs.

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PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

Dec. 11.

IN THE WILL AND ESTATE OF JOHN GLEESON.

Administration with the will annexed—Executor of an executor who pre-deceased the testator—An executor of an executor who has pre-deceased his testator is not entitled as such to administer the estate of the testator.

The testator by his will appointed Edward Gleeson and Thomas Toohey as executors of his will, but both died in his lifetime. Edward Gleeson having appointed the applicant, Pennefather, as sole executor to his will, and Toohey having appointed his wife sole executrix of his will, both Pennefather and Mrs. Toohey obtained probate to the respective estates of Edward Gleeson and Toohey. Mrs. Toohey renounced all claim to probate of the will of Gleeson.

MR. COLDHAM applied that letters of administration with the will annexed be granted to Pennefather as the executor of the executor of the testator, John Gleeson. The children of the testator are under age, and I am instructed to state, although it does not appear from the affidavit that the applicant, Pennefather, is a near relative of the children.

HIS HONOR said: The executor of an executor who has pre-deceased his testator is not entitled as such to administer the estate of testator. I refuse the application on that ground. The applicant must apply for administration as a relative of the children.

Proctor: *Chambers.*

IN THE WILL OF ALLISON. Dec. 11.

Supreme Court (Constitution) Act 1852 *(No.* 10*), sec.* 16*—Application by executors for leave to pass their accounts and for commission—The Court will not grant such an application where only three months have elapsed since the grant of probate.*

MR. AGG moved for an order for leave to the executors to pass their accounts, and for commission. Probate was granted on the 18th September, 1884. The executors will have to look after the estate till the youngest child, who is now one year old, comes of age.

HIS HONOR said: This is an application for an order to pass accounts, and for commission. Probate to the will was granted only three months ago. I am not disposed to grant such an application when only so short a time has elapsed since the grant of probate. I think the parties ought to wait till a year or so has elapsed before an order of this kind is applied for.

Proctors: *Wisewould* and *Gibbs.*

IN THE ESTATE OF ROSENTHAL. Dec. 11.

Regulæ Generales, 23*rd June*, 1873, *r.* 5—*Administration — The character in which the applicant claims to be entitled to administration must be set forth in the affidavit—Affidavit stating that the applicant applied "as the eldest brother" of the intestate is not sufficient—The affidavit should state that the applicant "was" the eldest brother, and claimed as such.*

Application for grant of letters of administration to Michael Rosenthal, the eldest brother of the deceased, and one of the next-of-kin residing within the jurisdiction of the Court.

The affidavit stated that the father and mother of the intestate resided out of the jurisdiction, that he left no widow or children, and that the application was made by Michael Rosenthal "as the eldest brother of the intestate."

The registrar took the objection that the character in which the applicant claims to be entitled was not set forth as required by *Regulæ Generales*, 23rd June, 1873, rule 5.

MR. BAYLES, for the applicant, contended that the statement in the affidavit that the application was made "as the eldest brother of the intestate" was sufficient to show that the applicant was the eldest brother, and claimed as such.

HIS HONOR said: The rules require that the affidavit shall set forth the character in which the person making an application for the grant of letters of administration claims to be entitled to such grant. This affidavit does not do so. It should have stated that the applicant "was" the eldest brother of the intestate, and claimed administration as such. I refuse the application.

Proctor: *Hill* for *Silvester.*

IN THE ESTATE OF RICHARD LEWIS.

Regulæ Generales, 23*rd June*, 1873, *r.* 5—*Administration—Where an application for administration is made by the mother of the intestate the affidavit should state that the intestate has left no wife or children.*

Application for administration by the mother of the intestate, as the only next-of-kin.

SIR BRYAN O'LOGHLEN, for the applicant: The affidavit states that the applicant is the mother of the intestate, and the only next-of-kin left him surviving. The registrar has taken the objection that this is not sufficient, but I submit that it fulfils all the requirements of the rules.

HIS HONOR: I do not think the affidavit is sufficient. The affidavit should state that the intestate left no wife or children. I refuse the application.

Proctors: *Madden* and *Son.*

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

REG. v. HERON, *ex parte* MULDER. Dec. 2.

Fences Statute 1874 *(No.* 479*), secs.* 7, 8, 9—*Prohibition—Dividing fence—Notice to contribute—Service of notice—A notice by one landowner calling upon his adjoining landowner to*

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contribute to the construction of a dividing fence must be served on such adjoining landowner personally—What is personal service.

Order *nisi* to prohibit the justices at Birregurra from enforcing an order by which they dismissed a complaint of *Mulder v. O'Neill*, with £4 4s. costs. It was sought to restrain the enforcing the direction for payment of the costs.

Dr. Dobson moved the order absolute. No cause was shown.

Mulder and O'Neill owned adjoining land, and the former wished to have a dividing fence erected on the land. The Fences Amendment Act, sec. 7, provides that where any person desires to compel another person to contribute to the construction of a dividing fence under the provisions of the Act he may serve on such person a notice to fence. Section 8 provided that, if within one month after the service of notice, the person serving and the person served with such notice do not agree as to the construction and kind of fence, &c., two or more justices, on the complaint of either, may make an order. In this Mulder had given the notice to O'Neill's wife. The complainant afterwards saw the defendant, and had a conversation with him, in which he referred to the notice, and said he would decline to put up the fence. The justices stopped the complainant's case, and dismissed it on the ground that there should have been personal service of the notice. There was another witness in attendance who could have proved that the notice had come into the defendant's possession. It was submitted for the complainant that the decision of the justices was wrong, and that the service was sufficient.

Mr. Justice Higinbotham regretted that the Court did not have the benefit of hearing argument against the rule, or the assistance which the justices could have rendered them by an affidavit from them. A notice was served by one neighbour on another to contribute to the construction of a dividing fence, and as the notice was not complied with, a complaint was made to the justices under the Fences Amendment Act. The justices dismissed the case on the ground, as stated in the affidavit of the complainant, that they held that no service of notice under the Fences Amendment Act, section 7, except personal service, was sufficient. The doctrine was one from which he entirely dissented. Where a statute required notice to be served, but did not provide how the service might be effected, either by delivery at a particular place, or in some other way specified in the statute, then no other way except personal service could be intended and personal service must be proved. But what did personal service mean? He apprehended that the justices must have been of opinion that personal service should be made by the one occupier upon the person whom he sought to make contribute to the erection of the fence. It appeared that the notice in this case had been given to the defendant's wife, and that it had come to the knowledge of the defendant; but the chairman of the bench said that the service should have been personal, and that no other notice was sufficient, and he assigned, as a reason, that the 9th section of the Fences Amendment Act was conclusive, which said, "if the person serving and the persons served with such notice," &c. It could only be conclusive on the supposition that the two occupiers must meet together and discuss between them the terms on which the fence should be erected, and that one occupier was to personally serve notice on the other. That, however, was not what was meant by personal service. If the person intended to be served had notice of the document, and had means of obtaining it from the person to whom it was given, that was personal service to all intents and purposes. The evidence in this case was not altogether satisfactory, and as the justices had to determine as to whether there was sufficient evidence of personal service in one aspect he should not have been prepared to say that the justices ought to have held that the service was sufficient. But they stopped the case before all the evidence was given, and after the complainant had said that he had a witness who could prove that the notice had come to the defendant's knowledge. The order for prohibition would therefore be made absolute.

Mr. Justice Williams concurred. If the complainant had been allowed to give the evidence which he desired to give, there would have been evidence from which the magistrates could have inferred that the notice had come into the hands of the defendant. The fact that he spoke of the notice, and referred to its contents was evidence from which the magistrates might have inferred that he got the notice, and it did not matter how he got it—whether he got it from his wife, or whether it was served on himself. The magistrates were clearly wrong, as they had never put themselves in a position of being able to decide whether the notice had been served on the defendant, but had based their decision on another ground—that there must be service by one occupier on the other.

Mr. Justice Holroyd concurred. The service must be personal, but here there was evidence of personal service which might or might not be sufficient. In the construction he placed on section 9 the chairman of the bench of magistrates forgot the old maxim, "*Qui facit per alium facit per se.*"

Reg. v. Hodges. Dec. 2.

Criminal Law—Conviction—Sentence—Prisoner previously convicted and sentenced on other charges—A prisoner was sentenced to a term of imprisonment to commence at the conclusion of other sentences previously passed upon him, Held, *that the form of conviction was good.*

This was a special case stated by Judge Hickman Molesworth, as chairman of General Sessions.

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The prisoner, John Hodges, was convicted by justices on four charges of indecent exposure. On three charges he received sentences. On the fourth he was sentenced to a term of imprisonment to commence at the conclusion of the sentences already passed on him. He appealed against the conviction. When the appeal was heard, an objection was taken that the form of conviction was bad, inasmuch as it appeared that the sentence was to commence at a future period not specified in, and which could not be ascertained from the conviction itself. The chairman of General Sessions held that the conviction was good, but reserved the question for the Supreme Court. No evidence was taken at the sessions.

MR. C. A. SMYTH appeared for the prisoner; MR. CHOMLEY for the Crown.

THE COURT held that the form of conviction was good, and remitted the case to the next sessions with this opinion.

O'SHANASSY v. LITTLEWOOD. Dec. 2.

Land Act 1862 (*No.* 145), *secs.* 53 (*III.*), 62, 83, 84.—*Land Act* 1865 (*No.* 237), *secs.* 41, 55, 62, 109—*Land Act* 1869, *sec.* 47—*Proclamation—Timber reserve—Effect—Fraudulent misrepresentation—Falsehood essential.*

Rule *nisi* for a nonsuit or a new trial.

MR. WEBB, Q.C., MR. BOX, and MR. HODGES moved the rule absolute; DR. MADDEN and MR. MITCHELL showed cause.

MR. JUSTICE HIGINBOTHAM delivered the judgment of the Court, as follows: Rule *nisi* to enter a nonsuit, or in the alternative for a new trial The action, which is for deceit, is brought by the purchaser against the vendor of the station or run called the Lower Moira run, upon an alleged false representation affecting the value of that property. The declaration originally contained two counts. The first count, which was on the contract, was not supported by the evidence, and was withdrawn by the learned judge from the jury at the trial. The second count alleged that the defendant fraudulently represented to the plaintiff that he (the defendant) was in lawful possession and occupation, as the licensee of the run, and could transfer to the plaintiff 18,800 acres of Crown land for grazing purposes, in addition to 4,983 acres of freehold land, whereas the defendant was in occupation of and could transfer to the plaintiff only 13,614 acres of Crown land. It was admitted at the trial, and afterwards, on the argument of the rule, that the plaintiff's case upon this count must stand or fall according as the plaintiff should succeed or fail upon a third count, which was added by leave of the Court at the trial. It was alleged in this third count that the defendant had falsely and fraudulently represented to the plaintiff that certain portions of Crown lands, called and known as Kinnear Island and Barmah Island respectively, then, in fact, formed part of and were comprised in the Crown lands which the defendant was possessed of under his licence from the Crown, and that he then had lawful right to transfer to the plaintiff those islands for grazing purposes. The fact that the defendant, by himself or his agents, made these representations was not disputed, but it was contended that the representations were in substance true, or, at all events, that there was no evidence that they were untrue. The latter representation, which admittedly is the only one material to be considered, is susceptible of two meanings. It may mean either that Kinnear and Barmah Islands were included at the time of the sale within the actual boundary lines of the Lower Moira run, or that these islands continued at that time to be a part of the Lower Moira run, so as to give the pastoral occupier of the run a right to occupy them for pastoral purposes, and to make him liable for the proportion of rent due in respect of them. The latter was understood by both sides to be the true meaning of the representation. The facts of the case, so far as they bear upon the question we have to determine, were as follows:—Both the islands were formed by the River Murray. Kinnear Island, which was the larger and the more valuable of the two, containing 4,200 acres. It is under water for nearly half of the year. It yields rich grass during five or six months of the year, from December to May or June, and is able to carry, during that time, a large part of the whole of the stock on the run. It was proclaimed a forest reserve by a proclamation published in the *Government Gazette* of July 16, 1869, under the authority of the Amending Land Act 1865, No. 237, sec. 41. The Board of Land and Works took no steps to withdraw it from the occupation of the pastoral occupier, Mr. Kinnear, who continued to use it down to the year 1876, when he sold the run to the defendant. The defendant also continued to occupy and use the island without any interruption by notice or otherwise from the Board of Land and Works until he sold it to the plaintiff on August 27, 1883. In the month of May, 1883, the defendant paid to the adjoining pastoral occupier, Mr. Ricketson, half the cost of erecting a dividing fence between this island and Ricketson's run. Considerable reductions of rent were made in respect of appropriations of Crown lands on the Lower Moira run for various purposes from time to time between the year 1869 and the time of the purchase of the run by the plaintiff. These appropriations had the effect of diminishing the area of the run from 64,665 acres in 1869 to 13,634 acres on June 15, 1883, and resulted, during the latter portion of this period, in a reduction of the rent paid for the run by the occupier, from £337 in the year 1877 to £55 6s., the amount fixed in June, 1883. But it did not appear that any of these reductions of rent was applied for, or was made, on the ground that Kinnear Island or Barmah Island, or any part of either of them had been taken out of the run and appropriated by or under the

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proclamation, or had ceased, in fact, to be available for purposes of pastoral occupation. The plaintiff took possession of the run on September 23, 1883, and in the month of November following tenders for licences for depasturing Kinnear and Barmah Islands under the Land Act 1863, section 47, were called for by the Crown. The plaintiff tendered for both islands, but was unsuccessful in obtaining a licence for Kinnear Island. Upon this evidence the learned judge proposed to leave it to the jury as a question of fact whether Kinnear Island—the question as to Barmah Island being waived by both parties as of small practical importance, and not demanding separate consideration—did or did not form part of the Crown lands going with the Lower Moira run at the time of the sale to the plaintiff. But at the request of the counsel for the plaintiff he directed the jury, as a matter of law, that the island had been excised from the run by virtue of the proclamation of July, 1869, and he reserved leave to the defendant to move to enter a nonsuit on the ground that there was no evidence that Kinnear Island was not a part of the Crown land included in the pastoral licence, and that it was proved that that island was in fact a part of the Crown lands included in the licence at the time of the sale. Under the law which was in force when Kinnear Island was proclaimed a timber reserve in July, 1869, the Board of Land and Works was the authority which decided the rent to be paid by the pastoral occupier for the licensed occupation of the Crown lands on which his stock depastured. All runs were divided into classes according to their grazing capabilities, and for the purpose of fixing the rent of each run it was necessary that the board should ascertain, as nearly as possible, the number of acres comprised in the run, as well as the number of sheep or cattle which the run was capable of carrying (see the Land Act 1862, No. 145, sections 83, 84). The decision of the board was subject in every case to appeal, to be heard by arbitrators (Act No. 145, sections 87-95); and by the Amending Land Act 1865, No. 237, section 56, previous errors should be corrected without appeal by the board itself. The same law contained various provisions by which Crown lands could be occupied for mining purposes, sold, selected for agricultural occupation, leased, or applied to various public purposes, and it became necessary, therefore, to provide that the license of the pastoral occupier should not be deemed to prevent a run, or any part of a run, from being sold or leased, proclaimed a common, or occupied by virtue of any miner's right or licence for other than pastoral purposes, or from being otherwise dealt with under the authority of law (Act No. 145, section 80; and Act No. 237, section 55). Obviously the value of a run to the pastoral occupier might be diminished or even reduced to nothing by the exercise of one or more of these powers, and accordingly it was enacted that whenever the value of any run should be "diminished by reason of any portion thereof being sold, leased, proclaimed a common, or otherwise rendered unavailable for the purposes of pastoral occupation," the board should, upon the request of the occupier, and upon payment of a fee, determine anew, subject to appeal, the amount of rent to be paid in future in respect of such run (Act No. 145, section 109; Act No. 237, section 62). By the last-mentioned Act the further condition was annexed to the right of the pastoral occupier to obtain a new assessment of his rent, that he should transmit to the board "a true statement of the particular portions so sold, leased, proclaimed a common, or otherwise rendered unavailable within his run" (Section 62). Until these conditions were complied with, and a new determination made, the rent, as originally fixed, continued payable. Some of these enumerated grounds for reduction of rent would necessarily involve an immediate reduction of the area of the run available for pastoral occupation, and would confer on persons, other than the pastoral occupier, a right to the exclusive possession of portions of his run. If a part of a run should be sold or leased, or proclaimed a common, the right of the pastoral occupier as against the purchaser, the lessee, or the persons entitled to commonage, would at once cease, continued occupation by him would become wrongful, and he would be immediately in a position to claim a reduction of his rent in respect of a particular defined part of his run, which had necessarily become unavailable for the purposes of continued pastoral occupation by him. In like manner, as soon as the holder of a miner's right should select and occupy a claim upon the run, the pastoral occupier's right of occupation of that claim would immediately cease. But this would not be necessarily the effect of the exercise of some of the powers of dealing with Crown lands under the Land Acts. The power given to the Governor-in-Council by section 41 of Act No. 237, to make and proclaim reserves for the preservation and growth of timber, may be exercised for different purposes and with different effects. The proclamation by itself confers no right upon anyone, and does not interfere in any way with the occupation for pastoral purposes of the land reserved. It has been held by this Court that neither a temporary nor even a permanent reservation of land under the Land Acts has *per se* any further legal effect than to indicate the intention on the part of the Crown that the land reserved shall not be sold (*Attorney-General v. United Hand in Hand and Band of Hope Co.*, 4 W. W. & A'B. (E.), p. 66). A permanent reservation creates no rights in anyone against the Crown, and the Crown can at any moment take possession of land so reserved (*Attorney-General v. Mayor, &c., of Sandhurst*, 2 V. R., p. 136). The primary purpose of a proclamation of a timber reserve under section 41 of Act 237 is similar to that of a proclamation under sec. 62 of Act

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No. 145. It is only by means of this power of proclamation that standing timber can be protected in certain selected places, and preserved from indiscriminate destruction by the holders of licences to cut timber under section 53 (III.) of Act No. 145. The proclamation of a forest reserve for this beneficial purpose would not render the land of the reserve unavailable for the purposes of pastoral occupation, and it could not, we think, have the effect *per se*, and without any subsequent notice given or act done by the board, or by the pastoral occupier, of excising the reserve from the run, so as to deprive the occupier of the right of occupation or the Crown of the right to the full assessed rent. In a case of this kind the question whether any portion of the Crown lands included in a run has been taken out of it by having been rendered unavailable for the purposes of pastoral occupation, constitutes, in our opinion, a mixed question of law and fact, to be determined by a consideration of the legal effect of the proclamation, and also of the actual condition of, and dealings with, the portion of the run alleged to have been excised. In the present case there was nothing but the proclamation. The reserve was, in fact, fully available for the purposes of pastoral occupation from the date of the proclamation down to the time of the sale. It was so occupied by the defendant and his predecessor without objection or impediment from the board, and apparently without a suspicion on the part of anyone that the reserve had been taken out of the run, that the occupier had ceased to be liable to pay rent for it, and that his occupation of it was wrongful. The falsehood of the representation made is an essential element of an action for deceit. The Chief Justice, who heard the argument, concurs with the other members of the Court in the opinion that the plaintiff has offered no evidence which could properly be considered by the jury of the falsehood of the representation relied on in this case, and that the rule for a nonsuit should be made absolute. It is unnecessary that we should deal with any of the other questions which have been raised on the alternative branch of the rule.

Rule made absolute to enter a nonsuit.

WALPOLE v. THE COLONIAL BANK. Dec. 2.

Policy of insurance—Company—Compromise—Difference between amount of policy and of compromise—Life Assurance Companies' Act 1873 (*No.* 474), *secs.* 37, 38, 39—*Notice of assignment—Notice of assignment of a policy followed by registration under the Act completes the title of an assignee against the insurance company at law to recover what is due on the policy.*

This was an appeal from a decision of Mr. Justice Molesworth, dismissing this suit. The bill was filed by the acting executor of J. T. Walpole, to make the bank answerable for the difference between a sum of £2000, the amount of a policy of insurance effected by Mr. J. T. Walpole with the Australian Alliance Company, and a sum of £1293, for which the bank, after Walpole's death, compromised the claim. The bank held the policy as part security for a debt due to it by Walpole. Mr. Justice Molesworth dismissed the suit, and the plaintiff appealed.

MR. NEIGHBOUR and MR. WATERHOUSE for the plaintiff (appellant); MR. WEBB, Q.C., and MR. HIGGINS for defendant (respondent).

MR. JUSTICE HOLROYD delivered the decision of the Court as follows: The plaintiff is the acting executor of John Thompson Walpole, who died by his own hand on the 7th June, 1877. The deceased had effected two policies on his life—one with the Mutual Assurance Society of Victoria Limited, for £1000, payable if his death should occur within two years from the 4th July, 1875; and the other with the Australian Alliance Assurance Company, dated 25th February, 1876, for £2000, payable on his dying before 1st February, 1879. The first policy contained a proviso that it should be void if the assured should die by his own hand. The second was subject to a condition that in the event of the assured dying by his own act (sane or insane) the policy should become void, "except to the extent of any *bonâ-fide* interest which at the time of such death should be vested in any person or persons for his, her, or their own benefit for a sufficient pecuniary or other consideration, provided that notice of such interest should have been received by the company within 14 days after the date of its inception." On the 16th August, 1876, these two policies were assigned to the Colonial Bank by memoranda of transfer endorsed in the form prescribed by the Life Assurance Companies' Act, No. 474. The transfers were intended as security for a debt then due by the assured to the bank, and for any future advances. The assignment of the Mutual policy was registered pursuant to the 39th section of the Act on the 29th August, 1876, and the assignment of the Alliance policy on the 6th September following. In the same year Walpole mortgaged certain Crown allotments to the bank by two instruments under the Transfer of Land Statute, and afterwards conveyed the fee to Heales, the bank's manager at Hamilton, who obtained certificates of title subject to the mortgages, and was, in fact, merely a trustee for the bank, the land being security for Walpole's indebtedness at the time of his death. Walpole left a will, which was proved by the plaintiff alone on the 5th July, 1877, leave being reserved to Laidlaw and Thornley, the other executors therein named, to come in and prove, which they have never done. After the death of the assured the bank compromised with the Alliance Company, and it was agreed between them that the company should take over the mortgaged lands at the price of £1170, and pay the bank £1293 in respect of the Alliance policy, and in April, 1878, the bank received these sums,

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making together £2463, and returned the policy, and the lands were transferred to the chairman of the company. The learned primary judge intimated his opinion that including in one bargain between the bank and insurance company the exercise of two powers of sale was unwarrantable, but adds that that was not argued before him. It was not argued before us, and we do not see how anything could have been made of the argument in this suit, to which the company is not a party, inasmuch as it was proved without contest that £1170 was a fair price for the land. Another possible argument alluded to by the learned judge has been made a ground of appeal, namely, that the bank should have been compelled to give credit for £2463, in addition to the sum received for the surrender of the policy, because that is the consideration stated in the transfer of the land to the company's chairman; although it is admitted that in fact the bank received only £2463 in all, being no more than the debt due at the time from the estate of the deceased. We think this ground is also untenable. Where two conveyances have to be executed by one party in consideration of a money payment to be made by the other, it is not unusual to state the whole payment as the consideration for each conveyance, notwithstanding that the parcels in each may have been separately valued. Here there was a conveyance to be executed, and an act to be done which is a similar case. At most, a mistake in the statement of the consideration puts upon the party making it the burden of showing clearly what the real consideration was. The plaintiff insists (and this is the real standpoint) that the full amount of the Alliance policy could have been recovered by the bank if it had used due diligence; and seeks to charge the bank with the difference between the £2000 and the £1293 accepted under the compromise. The non-recovery of the balance is the specific instance of wilful default alleged in the bill. It has been urged in the first place, that the bank's interest in the policy at the death of the assured extended to the whole £2000, because the debt then due to the bank exceeded that sum, and that the bank, by realising its other securities, so as to reduce its interest below £2000, could not diminish the amount recoverable by the company, which had been already ascertained. The reasoning of the learned judges in some of the cases cited to us, especially of Wood, V.C., in the *Solicitors and General Life Assurance Society Registered v. Lamb* (1 H. & M. 716), and of Malins, V.C., in *White v. British Empire Life Assurance Company* (L. R. 7 Eq. 394), supports that proposition very strongly, although it is not necessary for them to base their decision upon it, and in the first case the Lords Justices on appeal (2 De G. J. & Sm. 251) did not venture to go so far (see also *Cook v. Black*, 1 H. 390). But if we accept the proposition as established we have still to consider whether, in view of all the other circumstances, the bank was warranted in effecting a compromise. Our brother, Molesworth, was of opinion that the bank was entitled to make the best of its securities, and was certainly not bound to embark in litigation with the Alliance Company, and, therefore, held the compromise justifiable and dismissed the bill. The witnesses, after the lapse of time, found it difficult to recall exactly what had occurred. Mr. Palmer, who was the solicitor for the deceased, and also for the estate, as well as for the plaintiff personally, and who has obtained the plaintiff's consent to bring this suit in his own interest as a creditor, is mainly responsible for the delay. There can be no doubt, however, that the bank claimed from both companies the full amount covered by the policies, and that both refused, on account of the suicide of the assured, to recognise any liability. The difference in the position of the two companies was obvious. The Mutual Company was not pressed after its first refusal to pay; and nobody has ventured to contend that it could have been compelled to pay. The Alliance Company could have been compelled to pay if the notice required by the condition had been duly given, and the fact that this notice was not so given could alone have justified its refusal to pay anything. Greenlaw, the general manager of the bank, stated in his evidence that notice of the assignment not having been given within the time specified, meaning the time specified in the condition, was mentioned to him by Watson, the secretary or manager of the Alliance Company, as actuating his directors in declining payment. Our brother, Molesworth, thinks that the bank undertook the duty of having the assignment of the Alliance policy registered, and that it was his duty towards the deceased to take care that the notice was given to the insurance company within 14 days. He also thinks that notice of the assignment was so given. In the Court below it seems to have been taken for granted, that if notice of the assignment, for the purpose of having it registered under the Act, had been given within 14 days, the condition would have been satisfied; and the case was argued before us for the plaintiff on that assumption. But in our opinion that is a mistake. Notice of the assignment for the purpose of obtaining registration under the statute is totally different from the notice required by the condition. Notice of the assignment of a policy, followed by registration under the Act, completes the title of the assignee against the insurance company at law to recover what is due on the policy. The object of the 39th section was to prevent insurance companies from being harassed by claimants asserting equitable interest, and to make them responsible for payment only to the representatives of the assured or his legal assignees, subject, possibly, to exceptions which may arise under sections 37 and 38, but which we need not here

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consider. If the assignment is intended by way of security only, the memorandum of transfer must not disclose that fact; and the company is at liberty to disregard the rights of the mortgagor's representatives. But what the condition in the Alliance policy required was a notice, not of the ostensible, but of the real interest, in order to avoid a forfeiture as against the interesting party in the event of the assured's committing suicide. Unless that notice was given nothing was due under the policy, and nothing, of course, could be recovered against the company. We are inclined to agree with our brother, Molesworth, that notice of the assignment of the Alliance policy was given to the company within 14 days after the transfer was executed. On this policy the words "28th August" have been marked in pencil by way of memorandum. The marks seem of long standing. No one remembers when they were put there or who put them. As the assignment of the Mutual policy was registered on the 29th, the memorandum of transfer may not improbably have been lodged for registration on the 28th, and the marks on the other policy would then indicate that both memoranda were lodged for registration on the same day. The assignment of the policy should have been registered as soon as the memorandum was lodged, but according to Watson that was not the practice of the Alliance Company. Usually, but not always, an assignment of a policy was registered by the Alliance Company at the next board meeting after notice, but the matter might have been overlooked or postponed if it was reserved for the determination of the board. However that may be there is no evidence that any such notice as would satisfy the endorsed condition was ever sent to the company, and it is with the consequences of this omission that we have to deal. As there has been a confusion between the two notices, we wish to guard against admitting that the assignee of a policy of insurance, to whom the policy has been transferred by way of mortgage, impliedly undertakes to register the assignment. If he fails to make a legal title he cannot sue the company. But what obligation does he incur towards the mortgagor either to make such title, or to complete his security, if the legal title is necessary for its completion? Neither the mortgagor nor his representatives can suffer by the non-registration of the assignment. But although, as we have already pointed out, the two notices were treated in argument as essentially the same, it was certainly contended that it was incumbent on the bank to have given such a notice as would have satisfied the condition of the policy. How did this obligation arise? We cannot perceive any reason for it. We were referred to a dictum in the case of *Fortescue v. Barnett* (3 M. & K. 43), that the trustee of a voluntary settlement of a policy ought to give notice of the assignment to the insurance office. If that be so, why, and for whose benefit? For the benefit of the *cestuis que trustent*, and because otherwise the settlement might be defeated by the settlor, as, for instance, in the event of his subsequently mortgaging the policy to a stranger, who might complete his equitable assignment by notifying the fact to the insurers, and so obtain priority. It is not unreasonable to require that a trustee should use ordinary caution in protecting his beneficiaries from the consequences of a possible act of the settlor in derogation of their rights. But it seems very unreasonable to impose upon a mortgagee the duty of protecting the mortgagor's estate, that is in reality the mortgagor himself, from a possible act of his own, which, if done, would be in derogation of the mortgagee's rights. The policy effected by Walpole, deceased, with the Alliance Company would have expired after a limited period if he had not died within the time limited. But we cannot make any distinction on that score. In weighing the mutual obligations of mortgagor and mortgagee we must proceed as if the policy had been one for the life of the assured simply. Nothing has been proved which would lead us to conclude that Walpole was insane when he committed suicide. If he was, how can the bank, as mortgagee, be held responsible for not anticipating his insanity, and not guarding against the possible result of it for his benefit or the benefit of his representatives, which is really the same thing. If he was not then insane, his act was fraudulent against his mortgagee. By it he jeopardised, he might have destroyed, the bank's security. It was quite as easy for him to have given the company notice of the bank's interest, as for the bank; and the duty rested on him, if on anybody, for he had received value for the security, and he could not lawfully annihilate or imperil it. No man can take advantage of his own wrong; but if the plaintiff's contention is to prevail, a mortgagor may, by committing murder, extinguish his mortgagee's security, and by the same act compel the mortgagee to pay to his representatives the value of the interest so extinguished. Concluding that the bank lay under no obligation to save the mortgagor's estate from his own attempt to defeat the policy, was the compromise justified. If the company had stood firm nothing could have been recovered. What was recovered accrued to the advantage of the estate of the deceased by diminishing its liabilities. Greenlaw took legal advice upon the subject, and was informed that it was doubtful if he could enforce his claim. His evidence and his letters show that he did not know, or has not remembered, the reason, why he could not; but there was a very sound reason. In fact, as Mr. Watson has told us, the compromise was not entertained by the company on account of the posibility of the claim being substantiated, but merely to retain the business of the bank—a rich institution, whose business could not

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be sacrificed with impunity. The bank's interest with the company, and not its interest in the policy saved the £1293. Greenlaw also consulted Laidlaw, who had not renounced the executorship, and explained matters to him. Palmer was aware, at a very early stage of the proceedings, that the insurance companies were recalcitrant. Greenlaw wished the executors to assert their rights, if they had any, against the Alliance Company, or to indemnify the bank if it brought an action; but he was informed that there were no funds available. As far as we can judge, the bank did everything that lay in its power to obtain the best possible terms for itself and for the estate of the deceased, actually obtained a large sum, when nothing could have been obtained by an action, and is not to be blamed for not having risked the absolute loss of its security in a vain effort to recover what the folly of the assured had thrown away. The appeal must be dismissed.

MR. JUSTICE WILLIAMS said that he concurred in the judgment that had been delivered, but desired to add, in respect to the dicta of Vice-Chancellor Wood and the other judges that had been referred to, that he thought it exceedingly doubtful, to say the least, that where an assured had deliberately committed a fraud, when he was not insane, by taking away his own life, his representative should be entitled to recover anything whatever on the basis of the policy. In all the cases referred to in which these dicta were given the assured was either insane, or something equivalent to it, at the time he committed the act by which the policy became payable. In this particular case there was no occasion for assuming insanity. The man had deliberately killed himself, being sane, and that distinguished his case from the other cases cited.

Appeal dismissed, with costs.

REG. v. HOWITT, *ex parte* WALKER. Dec. 4.

Justices of the Peace (Amendment) Statute 1867 (*No.* 319), *sec.* 2—*Affidavit* jurat—*The affidavit of personal service of a summons required by sec.* 2 *of Act No.* 319 *should show on its face that it was both signed and sworn before the justice before whom it was made.*

Order *nisi* to compel the justices at Brandy Creek to hear a complaint of *Walker v. Osborne*. The complaint was for goods sold. The defendant did not appear, but an affidavit was put in that he had been personally served with the summons. The justices took an objection to the form of the *jurat* of the affidavit. By section 2 of the Act to Amend the Justices of the Peace Statute, it is provided that in case "a copy of a summons shall have been delivered to the party personally," the person serving the summons "shall make and sign before some justice or commissioner for taking affidavits an affidavit, endorsed on the original summons, stating the time and the manner in which the true copy thereof has been served." In this case the affidavit of service made before a justice was on a printed form, and the *jurat* commenced, "sworn before me." The justices who heard the complaint would not receive the affidavit, on the ground that it should have contained the words, "signed and sworn," and not merely "sworn," as the act expressly required that the signature should be written before the justice before the affidavit was made, and they, therefore, struck out the case. This application was made to compel them to hear the case, on the ground that it was to be presumed that the signature was made before the justice, and that he had complied with the act.

MR. M'INTYRE moved the order absolute. No cause was shown.

THE COURT held that it should appear by the affidavit that it was signed as well as sworn before the justice, and, therefore, discharged the order.

Dec. 4.

REG. v. ALLEY, *ex parte* CLAUSCEN.

Public Health (Amendment) Statute 1883 (*No.* 782), *sec.* 131—*Formation of street on private property — Notice to form—Neglect—The local board can, under sec.* 131 *of Act No.* 782, *sue for the penalty for neglecting to form a private street after notice, although they may have elected to execute the works themselves if the works have not been executed at the time the complaint was made.*

Order *nisi* to prohibit the justices at Fitzroy from enforcing a fine of 19s. 9d. on Bertha Clauscen, for not complying with an order of the Fitzroy City Council to form and pave a private street. The proceedings were taken under section 131 of the Public Health (Amendment) Statute 1883 (No. 782), which provides that in case any street, lane, or passage set out on private land is not formed or paved to the satisfaction of the local board, the board may give notice to the owners of property fronting, adjoining, or abutting upon such parts as require to be formed, &c., requiring them to form the streets, &c., and in default of compliance with the notice the owner shall be liable to a penalty not exceeding £10 for each day during which such notice shall not have been complied with. The section proceeded to enact that the said local board may, if they think fit, subsequently to or in lieu of prosecuting for such non-compliance, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default. Mrs. Clauscen had received notice to pave the street on or before the 28th May. She did not comply with the order, and on the 15th August she was summoned to appear at the Fitzroy Police Court for non-compliance. She did appear, and at first admitted the facts, and the chairman was about to inflict a fine when a solicitor appeared for her, and had the case re-opened. Mr. Cooze, the surveyor of the council, stated that the council had let a contract for the execution of the works. This contract was, however,

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not signed till the 20th August, two days after the case was heard at the police court. The justices inflicted a fine of 3d. per day, making altogether 19s. 9d. The prohibition was applied for on the ground that the local board, having made an election to execute the work themselves, could not proceed for a penalty.

THE COURT held that under the section the local board could sue for the penalty, as the works had not been executed at the time the complaint was made. The order for prohibition was therefore discharged.

Dec. 5.

REG. v. MOORE, *ex parte* MYERS.

Pawnbrokers' Statute 1865 (*No.* 248), *sec.* 21—*Pledge ticket—Signature—A pledge ticket containing the name of the pawnbroker in print is sufficiently signed under the Act No.* 248—*Unless a statute require that a signature should be made in a particular way a mark is sufficient.*

Order *nisi* to quash a conviction made by the justices at South Melbourne, by which Mr. L. M. Myers, the manager of the Mont de Piété Company, was fined 5s. and costs for breach of the Pawnbrokers' Act, for that he, being a licensed pawnbroker, gave a pawn ticket to a person named Moore for a pledge without having signed his name to the ticket. The ticket was partly printed and partly written. It was issued by J. O'Farrell, who was employed at the branch establishment of the company at South Melbourne. The name of Mr. Myers was printed on the ticket as licensed manager for the company, and beneath his name O'Farrell wrote his. The justices decided that this was not a sufficient signature by Mr. Myers within the meaning of the Act, and, therefore, inflicted a fine. It was contended, on behalf of Mr. Myers, that the signature was sufficient.

MR. JUSTICE HIGINBOTHAM said that this was an order *nisi* to quash a conviction by justices at South Melbourne by which Lewis M. Myers, a licensed pawnbroker, was convicted of not having given to a person who pawned an article with him a pawn ticket signed by him. The defendant held a licence as a pawnbroker for premises at which the article was pawned. It was proved that a ticket was given by his authority, which purported to represent a loan by the Australian Mont de Piété Company to the pledger. It was signed, "L. M. Myers, licensed manager," in print, and beneath this were the words in writing, "*per* F. O'Farrell." It was urged for the complainant that this was not a signature within the meaning of the Act.

THE COURT was of opinion that the ticket contained all the particulars that were required by the statute. Unless a statute required that a signature should be made in a particular way a mark was sufficient. If the mark was made or impressed by the authority of the person whose signature it purported to be that was sufficient. If a statute did not require a signature by subscription a name at the head of a document was sufficient. A printed signature was sufficient if it was done with the authority of the person whose name it purported to be. The order would, therefore, be absolute to quash the conviction.

Order absolute to quash the conviction.

Dec. 6.

REG. v. HARDWARE, *ex parte* SMITH.

Imprisonment for Debt Act 1865 (*No.* 284), *sec.* 3—*Debtor's summons—Minute of the order—Subsequent order—A minute of an order of justices which disclosed no offence as having been committed by the debtor is bad—So likewise is a formal order which does not disclose any offence mentioned in sec.* 3 *of Act No.* 284.

Order *nisi* to prohibit the justices at Drouin from an order made in a judgment summons in a complaint of *Hardware v. Smith.* The justices had directed the defendant, on the 9th September, to pay the debt within seven days, or go to gaol for six weeks. In the minute of the order it was not stated for which of the reasons enumerated in section 3 of the Imprisonment for Debt Statute the order was made, and it was therefore objected, on behalf of Smith, that the order was bad. The complainant, however, relied on a formal order that had been subsequently drawn up, but this order, it was also contended, was invalid. It stated as the reason for the justices' decision that Smith had, since the judgment was given against him, had sufficient means to pay the debt, but omitted to state, as required by the section, that he "had refused and neglected to pay" the debt. It was submitted for the complainant, however, that a statement in the earlier part of the order that the debt wholly due and unsatisfied was sufficient to cure that defect.

MR. DONOVAN moved the order absolute. MR. WEIGALL showed cause.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said: It could not be repeated too often, till justices and others fully understood it, that the act was intended as a substitute for the old system of imprisonment failing payment of a debt. It was a penal system; it provided punishment for dishonest acts of a debtor, and it was the duty of justices or of judges of this court, as the case might be, when cases of this kind came before them, to inquire, not into the existence of the debt, but as to whether any one of the numerous offences mentioned in section 3 had been committed by the debtor. Unless the justices or judges, as the case might be, found that some one of the offences enumerated in the section had been committed, they had no jurisdiction to make an order under this act. The order was penal in its character and its consequences, and the justices had no jurisdiction to make an order unless the debtor had committed that which the law regarded as an

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offence. The fact of the money being due was not sufficient. In the present case the minute made by the justices was defective, and it disclosed no offence as having been committed by the debtor. But an order had been produced, signed by the justices. It did not appear when it was drawn up or how. It was dated the 9th September, but it might have been drawn up after that date, and after the order *nisi* for prohibition had been granted. That was a fact which might have been of great importance, and the obligation of proving that it was, in fact, made before the 9th September rested on the person who relied upon it. It was, however, defective in this material particular, that it did not state any offence mentioned in the section. It stated that the defendant had sufficient means and ability to discharge the debt, but it did not go on to say that he neglected and refused to pay the same, and that should be part of the order of the justices. The order *nisi* to quash the order of the justices would, therefore, be made absolute.

Dec. 6.

REG. v. GARSIDE, *ex parte* BIGGS.

Police Offences Statute 1865 *(No.* 265*), sec.* 17 *(VI.) —Trespass—A trespass for which a fine could be imposed under Act No.* 265 *must be a personal one.*

Order *nisi* to prohibit the justices of Warragul from enforcing a conviction against one F. E. Biggs, under the Police Offences Statute for wilful trespass on land of the complainant, Benjamin Serjeant.

MR. M'INTYRE moved the order absolute. No cause was shown.

The affidavits were to the effect that F. E. Briggs was manager of a sawmill for his father. Two of the men employed at the mill took teams with timber across land claimed by Serjeant. He told them not to go there again, but acting under the direction of F. E. Biggs, they did go again on the land with the teams. Biggs was not present at the time they went on the land, but he was afterwards summoned for the trespass committed by the men, and was fine 10s. It was contended on his behalf that the trespass for which a fine could be imposed under the Police Offences Act must be a personal one, and as Biggs had not trespassed, he had not committed any offence.

THE COURT made absolute the order to prohibit the enforcing of the conviction against Biggs.

MASON v. RYAN.

County Court appeal — Ejectment — Trial before jury—County Court Statute 1869, *No.* 345, *sections* 72, 74, 76*—Jurisdiction – The action of ejectment in the County Court cannot be tried by a jury—It does not fall within the three classes of exceptions to the rule that a judge of a County Court has the exclusive power to determine all questions of fact as well as of law.* Semble, *a trial so held is a nullity, not an irregularity and therefore cannot be allowed by counsel.*

This was an appeal from the County Court, Melbourne. The plaintiff sought to eject the defendant from land at Richmond. The plaint summons was taken out for trial before a judge, but the plaintiff subsequently obtained an order for the trial to be held before a jury. The trial was held before Judge Cope and a jury of four, when the jury gave a verdict for the plaintiff. The defendant afterwards applied to set the verdict aside on the ground that there was no jurisdiction to try the case before a jury, and that the judge alone had jurisdiction to try it. Judge Cope made an order to set aside the verdict, and plaintiff appealed.

MR. HODGES for the plaintiff (appellant). DR. MADDEN for the defendant (respondent.)

MR. JUSTICE HIGINBOTHAM in delivering the judgment of the Court, said: This was an appeal from a decision of the judge of the County Court at Melbourne, setting aside the verdict obtained by the plaintiff in an action of ejectment on the ground that the Court had no jurisdiction to try the action by a jury. I am of opinion that this decision of the judge was correct. Except in three classes of cases, the judge of a County Court has the exclusive power to determine all questions of fact as well as of law. These exceptions are—first, in actions where the amount claimed exceeds £20, and either the plaintiff or the defendant requires a jury; secondly, in suits for the recovery of unliquidated damages, where the judge requires a jury (County Court Statute 1869, section 72); and thirdly, in cases where a demand for a jury might have been made by either party, but has not been made, and the judge, on application made to him, or on his own motion, thinks the cause proper to be tried by a jury (section 74). The action of ejectment does not come within any of these exceptions. But it was strongly urged upon us that the defendant in the present case had consented that the trial should take place before a jury, and that it was not open to him to take the objection on which he now relies. If an objection to the jurisdiction could be waived by consent, the conduct of the defendant afforded conclusive evidence of his implied consent. The plaintiff applied for a jury, but when intimation was given to the defendant, he raised no objection either then or at the trial, at which he appeared. The principal question in dispute between the parties was of fact, namely, adverse possession, and this was determined by the jury in favor of the plaintiff, without remonstrance by the defendant. If the trial of this question by a jury, in an action of ejectment, had been an irregularity only, the defendant could not be heard to raise this objection. But we think that the trial was a nullity—not an irregularity, and that the Court had no jurisdiction; and consent does not operate to waive a nullity, or to create jurisdiction. It has been contended by Mr. Hodges that the County Court had jurisdiction to deal with

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the subject-matter of this action, and that it has only dealt with that subject matter in an irregular way. But the tribunal, constituted, as it was, of a jury and a judge, was a tribunal that had no jurisdiction to try this cause. When a verdict is given by a jury in the County Court judgment must be entered in accordance with the verdict (sec. 76); in cases determined by the judge his decision is the judgment of the Court (sec. 72); a verdict by a jury in ejectment is not a judgment irregularly entered, it is not a judgment of the Court at all. This case has not been tried, nor has any decision been given by the judge, who alone has authority to give a decision which shall be the judgment of the Court. That consent of the parties cannot give judicial authority to a Court is shown by the case of *Lawrence v. Wilcock* (11 Ad. 4 Ellis, p. 941), where the writ of trial and subsequent proceedings in an action for unliquidated damages, not triable before the sheriff under 3 and 4 Will. IV., c. 42, sec. 17, were set aside, although the defendant had assented, as in this case, to the trial being had before the sheriff. So when an action for a tort to which the same Act of Parliament did not extend was tried by consent of the parties before the under-sheriff, and the plaintiff obtained a verdict, a rule was made absolute to set aside the judgment on the ground that the record was informal, and no judgment could be given on it. The Court observed that the judgment was a perfect nullity, and that both parties had been guilty of an illegal act in taking the case before a tribunal which was incompetent to try it (*Smith v. Brown*, 2 M. & W., p. 851). It was contended lastly that the learned judge had no power to set aside the verdict without granting a new trial. It may be doubted whether the judge had power to grant a new trial in this case under the authority conferred by the Act of Parliament when the first trial was a mere nullity. But I think that the Court, although having a limited jurisdiction only, it has no jurisdiction beyond what the Legislature has given it (*Rorke v. Erington*, 7 H. L. C. 617), has an inherent power to prevent the abuse, and to correct irregularities in the frauds upon its own procedure and rules, and for that purpose to set aside proceedings which it may find to be void or irregular. The appeal will be dismissed with costs.

MR. JUSTICE WILLIAMS and MR. JUSTICE HOLROYD concurred.

Appeal dismissed with costs.

IN CHAMBERS.

(Before His Honor Mr. Justice Williams.)

Dec. 2.

M'KENZIE AND ANOTHER v. HANHAM.

Rules of Supreme Court 1884, *Order XIX., r.* 27—*Order XXIII., r.* 6—*New assignment—Pleading embarrassing—Reply ordered to be struck out or amended on the grounds that it raises a "new assignment," that it contains inconsistent statements, and that the points of law intended to be raised by it are not clearly raised.*

Summons on behalf of the defendant calling upon the plaintiff to show cause why the reply delivered in this action should not be struck out on the ground that it pleads evidence, and tends to prejudice or embarrass the fair trial of this action.

The statement of claim stated: 1. The plaintiffs were, at the time of the committing of the grievances, in occupation of certain premises. 2. The plaintiffs carried on at the said premises the business of hay and corn factors. 3. The plaintiffs were possessed of certain goods and chattels, and stock-in-trade necessary for the carrying on of their said business. 4. The defendant wrongfully broke and entered the said premises, and carried away the said goods and chattels, and stock-in-trade. 5. The defendant wrongfully deprived the plaintiffs of the said goods, etc., by refusing to give them up on demand. Then followed particulars of special damage.

Statement of defence: 1. The defendant denies the allegations contained in the statement of claim. 2. The defendant further says that neither the premises nor the goods mentioned in the claim were the plaintiffs' as alleged. 3. The defendant will contend that he did the matters and things complained of by the leave of the plaintiffs. 4. The defendant further says that he (the defendant) being duly seised of a certain messuage and premises, being the premises mentioned and described in the first paragraph of the statement of claim, did, by agreement in writing, dated the 19th June, 1884, duly demise and let the same to one Etheridge at a rent duly agreed on between the defendant and the said Etheridge. And afterwards the said rent having fallen in arrear, and remaining unpaid, the defendant on the — day of—— entered in and upon the said messuage, etc., and duly seized and took, as and for a distress for the said rent so being in arrear, certain goods and chattels then being in and upon the said messuage, etc., and duly disposed of the same according to law, and determined the said tenancy under the powers conferred on him by the said agreement between himself and the said Etheridge in that behalf, which are the grievances complained of. 5. That at the time of the happening of the alleged grievances, the goods, etc., mentioned were the defendants. 6. That the premises at the time mentioned were the defendants.

The defendant counter-claimed for money paid by the defendant for the use of the plaintiffs at their request.

The plaintiffs' reply was as follows:—1. They join issue. 2. Prior to the grievances complained of, the defendant lent the plaintiffs £310; and to secure the due repayment thereof, the plaintiffs agreed with the defendant to give him security over their plant and stock-in-trade, and their

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interest in the premises wherein they carried on their business. 3. In pursuance of this agreement the plaintiffs transferred to defendant by a contract of sale in writing, all their plant and stock-in-trade, but the plaintiffs, in accordance with the agreement, remained in possession thereof, and were to have them re-transferred upon payment of the sum lent with interest. 4. This contract of sale was never registered under the Instruments and Securities Statute. 5. In further pursuance of the agreement the defendant, with the concurrence of plaintiffs and of plaintiffs' landlord, let the premises to Etheridge on behalf of the plaintiffs, he being then a partner of plaintiffs. 6. The said Etheridge subsequently died, and plaintiffs continued in possession of the said premises, and paid the rent thereof. 7. The defendant distrained upon the said plant and stock-in-trade as for rent due by the plaintiffs to him, and after the said distress, and before any disposal of the said goods, etc., the plaintiffs paid to the defendant the amount then due for the said rent, together with all costs, charges, and expenses, and the defendant thereupon withdrew the said distress. 8. The defendant subsequently seized and sold the said goods and chattels, alleging that the same were his absolutely, by virtue of the aforesaid contract of sale. 9. The plaintiffs will contend that the said contract of sale was, and is, void, as being an evasion of the provisions of the Instruments and Securities Statute.

The plaintiffs, as to the counter-claim, say that: 1. The money counter-claimed is the same money referred to in paragraph 2 of the reply to the defence, and defendant has repaid himself out of the proceeds of the said goods and chattels. 2. Defendant received from the plaintiffs, as further security for the repayment of the money so lent, certain promissory notes, which are still current and outstanding.

Dr. Madden, in support of the summons: The application is made under Order XIX., rule 27. A pleading must really be a pleading, it cannot be a mere setting out of an agreement. If the defendant cannot show a leave to enter, and that the goods were his, the defence must fail (*Williamson v. L. and N. W. Railway Co.*, 12 C. D. 784). The reply must not set up new claims. This reply pleads evidence.. It sets out the agreement, and it makes a new assignment.

Mr. Hood, to oppose: The action is one for trespass. The defendant sets up several defences. What the plaintiffs want to prove is that the whole arrangement as landlord and tenant is a sham (*Benlow v. Low*, 13 C. D. 553; *Hall v. Eames*, 4 C. D. 431). There is no limit to what may be said in reply, except that it must not be scandalous or irrelevant (*Mullington v. Lord*, 29 W. R. 207). The facts on which the plaintiff relies must be stated. Order XIX., r. 4, states that every pleading shall contain the material facts. The plaintiffs say that the goods were theirs, that they borrowed money from the defendant and gave him a bill of sale.

Dr. Madden: What the plaintiffs want to show is that the defendant's title is bad. That the bill of sale is not registered, and so is void.

His Honor said: The special reply to which objection is taken, as I understand it, admits the distress for rent, and that rent was due, but alleged that before the goods were removed, the plaintiffs paid the rent due (see par. 7). It then, in paragraph 8, alleges that after this the defendant made another and different seizure on another and different ground; this, under the old practice, would be matter for new assignment to the defendant's statement of defence set out in the 4th paragraph of his statement of defence. Consequently the reply in this respect is a violation of Order XXIII., r. 6. Apart from this the point of law, that the reply evidently intends to raise is not clearly raised. Does it merely intend to say that the second seizure of the goods was wrongful because the document under which the seizure was made was invalid, or also that the relation of landlord and tenant did not subsist between the parties for the reason that it only subsisted by and under the same document invalid for the same reason. If so, this latter point should have been distinctly and unequivocally stated, and when so stated I am disposed to think it would be inconsistent with the statements in paragraph 7 of the reply. *Quacunque viâ* the reply is embarrassing, and also, it seems to me in violation of rule 6 of Order XXIII. I, therefore, order it to be struck out with costs, unless it be amended within four days. If amended, plaintiffs to pay the costs of this application, and those occasioned by the amendment. I certify for counsel.

Solicitors: For plaintiffs, *Potts*; for defendant, *Madden* and *Son*.

(Before His Honor Mr. Justice Higinbotham.)
Dec. 10.

Blackburn v. Mayor, etc., of Melbourne.

Rules of Supreme Court 1884, *Order XIX.*, *rr.* 4, 5, 7, 19, 27—*Appendix D.*, *sec. VI.*—*In an action for wrongs the denial by the defendants of all the "material allegations" in the statement of claim is not sufficient—A statement in the defence that the alleged injuries were occasioned by a certain instrument, and that the defendant had not the care and management of or any property in such instrument is not only an allowable but a very proper defence to put on the record.*

Application on behalf of the plaintiff calling upon the defendant to show cause why the whole defence, or part thereof should not be struck out or amended as being embarrassing and insufficient.

Mr. Forlonge, in support of the summons: The statement of claim is as follows—1. The defendants were, at the time of the happening of the occurrence

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mentioned in paragraphs 2 and 3, and still are, a municipality within the meaning of the Local Government Act 1874, and had the care and management of a public street called Elizabeth-street, at Melbourne. 2. The defendants negligently and improperly managed and kept the said street in such a manner that they allowed a hole in such street to be and continue for a long space of time uncovered and unprotected, so as to be dangerous to persons using the street. 3. The plaintiff had suffered damage from personal injuries to the plaintiff and damages to his horse and brougham, caused by defendants negligently leaving the hole uncovered and unprotected, as mentioned in paragraph 2, on the 3rd day of October, 1884. To this the defendants have pleaded, 1. They deny all the "material" allegations in the statement of claim. 2. The defendants will contend that the alleged injuries and damage were occasioned by a certain fire plug in the said street, and that they (the defendants) had not the care or management of, nor any property in, the said fire plug. Rule 17 of Order XIX provides that it shall not be sufficient for a defendant in his statement of defence to deny "generally" the grounds alleged by the statement of claim, but he must deal "specifically" with each allegation of fact of which he does not admit the truth. The defendant, in the 1st paragraph of the defence has given a general denial. This rule must be construed strictly, and it is absolutely necessary to have a specific denial (*Thorp v. Holdsworth*, 3 C. D. 637; *Byrd v. Nunn*, 7 C. D. 284). Order XIX., rule 5, provides that the forms shall be used; but to enable the defendant to justify his pleading as being under the forms he must show that the forms are applicable and sufficient (*Rutter v. Tregent*, 12 C. D. 758; *Green v. Levin*, 13 C. D. 589; *The Isis*, 8 P. D. 227). Even if the forms are sufficient the defendant has not followed them. The second paragraph of the statement of defence is bad under Order XIX., rule 19, as being evasive, in as much as it neither confesses or denies any allegations in the statement of claim.

DR. MADDEN, to oppose: Order XIX., rule 5, provides that the forms in Appendices C, D, and E, when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient any longer forms shall be deemed prolix. The form of denial to actions for wrongs is given in Appendix D, Sec. VI., and is as follows: Denial of the several acts [or matters] complained of. The defence has denied all the facts. It says that whatever the plaintiff says is a material allegation the defendants deny. There can be no immaterial allegations in pleading unless the pleading be prolix, so that the defence denies all the facts in the statement of claim. The second paragraph of the defence is intended to give the plaintiff notice that the hole which caused the accident does not belong to the defendants. This is a material fact on which the defendants rely, and must be stated (Order XIX., rule 4.)

HIS HONOR said: I am not prepared to say that the defendants may not use the forms in Appendix D, though in some cases I think that these forms might be difficult to follow, having regard to Order XIX., rule 17. I think this rule is of the utmost importance, still the form is here, and if the defendants had resorted to it I should have found great difficulty in refusing the pleading. They have not done so, however, but have added words which may make all the difference. The second paragraph of the statement of defence is, in my opinion, not only allowable, but is a very proper one to put on the record, under it the defendants may set up a perfect defence to the action. With regard to its form I think it is stated with perfect plainness, and is not in any way embarrassing, I will allow the application in respect to the first paragraph of the statement of defence; defendants to be at liberty to amend within two days. Defendants to pay the costs of this application which I fix, by consent, at three guineas. I certify for counsel.

Solicitors: For plaintiff, *Kidston*; for defendants, *F. Stephens, senr.*

(Before His Honor Mr. Justice Williams.)

TAYLOR AND ANOTHER v. PORT. Dec. 16.

Rules of the Supreme Court 1884, *Order XIX., rule 7—Particulars—Application for particulars ought to be made before the party applying has pleaded—Application for particulars after the party applying has pleaded will not be granted unless under special circumstances.*

Application on behalf of the defendant, under Order XIX., rule 7, for an order that the plaintiffs do, within seven days, deliver to the defendant an account in writing of the particulars of the medical and other expenses and of the amount of business loss respectively mentioned in the statement of claim.

MR. PYMAN, on behalf of the plaintiffs, took the preliminary objection that the application was too late, as the defendant had delivered his statement of defence. Order XIX., rule 8, provides that the party at whose instance particulars have been delivered shall have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons; this shows that it was the evident intention of the rules that a party should apply for particulars before he pleaded. The summons likewise is informal, inasmuch as it only asks for particulars, and not for "further and better" particulars.

MR. PIRANI, in support of the summons: The action is for negligence, brought by the plaintiff and his wife for injury sustained by the wife from the negligent driving of the defendant. No particulars of damage were delivered with the statement of claim, so that the defendant is entitled to

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particulars, and not "further and better" particulars. If the objection that the application is too late be a good one, it is not a fatal objection, but is only a matter of costs.

His Honor said: I think the form of the summons is correct. I think this is a case in which particulars ought to be delivered, unless the application is made too late. Order XIX., rule 7, specifies no time within which the application should be made, but I think the spirit of the rules shows that it should be made by the defendant before he has delivered his statement of defence, and by the plaintiff, if the statement of defence is such as would entitle him to particulars, before he has delivered his reply. This is the old practice. I will grant this application as the practice is new, although I do not think any special grounds have been advanced for my doing so. I will not, however, grant such an application in future where the party who seeks for particulars has pleaded before making the application, unless special grounds for my doing so be shown. I allow the summons, defendant to pay the costs. Particulars to be delivered within 14 days.

Solicitors: For plaintiffs, *Pyman*; for defendant, *Braham* and *Pirani*.

(Before His Honor Mr. Justice Higinbotham.)

Dec. 10, 19.

Hogan v. Moore and Others.

Common Law Procedure Statute 1865 (*No.* 274), *sec.* 308—*Foreign judgment* "in personam"—*Execution in Victoria where judgment has been obtained in New South Wales against one member of a co-partnership on behalf of all the members—Execution can issue in Victoria against all such members upon the filing of a memorial of such judgment—Where a foreign judgment* "in personam" *is sought to be enforced in Victoria, such judgment is conclusive between all the original parties to the cause to the same extent as in the country where the judgment was obtained, and is not examinable in our Courts except for defects apparent on the face of it, or upon extrinsic evidence adduced to show that the foreign Court had no jurisdiction, or that the judgment was obtained by fraud or manifest injustice.*

Application on behalf of the plaintiff calling upon the defendants to show cause why execution should not be issued upon a judgment which was issued in New South Wales.

Mr. Hodges, in support of the summons: The affidavit of the plaintiff states that he brought an action in New South Wales against the Duke Gold Mining Company for breach of contract, for trespass, and for money payable; that the action was tried and judgment obtained, and that the defendants are members of the partnership. The memorial of the judgment was filed in the Supreme Court of Victoria, and the plaintiff now asks for leave to issue execution under sec. 308 of the Common Law Procedure Statute, against Moore and others, members of the co-partnership, as being the persons against whom such judgment was obtained. According to the law of New South Wales, execution could issue against all persons who were members of the co-partnership at the time the contract sued upon was made. That being so, the *lex loci contractus* must prevail, and execution can issue in this colony upon a filed memorial of the judgment against all the defendants.

Dr. Madden, to oppose: Power is given under sec. 308 of the Common Law Procedure Statute to issue execution against the person against whom judgment has been signed. In this case it is sought to issue execution against persons against whom judgment has not been signed. Judgment was signed against Benjamin Moore, the chairman of the Duke Gold Mining Company, and he is the only person against whom execution can be signed.

His Honor said: On 17th May, 1880, the plaintiff, Hogan, obtained a judgment in the Supreme Court of New South Wales in an action on a contract for £785 odd against Benjamin Moore, one of the members of a co-partnership carrying on business at South Gundagai, in New South Wales, under the style of the Duke Gold Mining Company. In accordance with the law of New South Wales, Moore was sued as one member of the co-partnership on behalf of all the members. The memorial of this judgment was filed in the office of the Supreme Court of Victoria on 6th May, 1884. Application is now made on behalf of the plaintiff under section 308 of the Common Law Procedure Statute 1865, for an order to issue execution against Moore and nine others, members of the co-partnership, as being the persons against whom such judgment was obtained. It was contended by Dr. Madden that by the law of Victoria no judgment has been obtained against any of the defendants except against Moore, and that as the enforcement of this judgment is a matter of procedure, the application must be governed by the *lex fori*, which, in this case, provides no means of proceeding against one member of the co-partnership so as to bind the other members. Mr. Hodges on the other hand, argued that as, according to the law of the country where this judgment was obtained, execution could issue against all the defendants who were members of the co-partnership at the time the contract sued upon was made, the *lex loci contractus* must prevail, and execution can now issue upon a filed memorial of the judgment against all the defendants. The question is not to be determined, in my opinion, by reference to the rules which prevail with regard to the effect to be given to a contract made in a foreign country, because the present is not a case relating to the nature, the validity, or the interpretation of the contract. Nor, for the like reason, does the case come within the rules which establish that

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questions relating to the enforcement of remedies on contracts must be determined by the *lex fori*, or the law of the country to the tribunals of which the appeal is made. The question I have to consider is what effect is to be allowed to a judgment *in personam* of a Court of a foreign country, which is sought to be enforced in Victoria against the original defendants or their property. And it is now settled law that such a foreign judgment, when it is sought to be enforced in another country, is conclusive between all the original parties to the cause to the same extent as in the country where the judgment was obtained, and that it is not examinable in the Courts of the country where it is enforced, except for defects apparent on the face of it or upon extrinsic evidence adduced to show that the foreign Court had no jurisdiction, or that the judgment was obtained by fraud or manifest injustice. None of these objections has been taken to this judgment. The remedy provided by section 308 is co-extensive with the remedy by action on the judgment. All the defendants against whom the judgment was obtained in the Supreme Court of New South Wales, would be liable in an action brought against them in Victoria upon that judgment. Execution, therefore, can issue, in my opinion, against all of them under section 308, upon the filing of a memorial of that judgment in the office of the Supreme Court of Victoria. I make the order applied for, with costs, which, if the parties consent, I will fix at four guineas. I certify for counsel.

Solicitors: For plaintiff, *Smith* and *Emmerton*; for defendants, *Hardy* and *Madden*.

(Before His Honor Mr. Justice Williams.)

Dec. 23.

BALLARAT BANKING CO. LIMITED v. WALL.

Rules of Supreme Court 1884, *Order XXI*, *rr.* 10 11—*Defence and counter-claim—The defence and counter-claim are distinct pleadings, and should be kept separate—An application to strike out pleadings on the ground that they are embarrassing ought to be made on summons "in Chambers"—Taking objection to the pleadings at the trial is an objectionable mode of procedure.*

Application on behalf of the plaintiffs, calling upon the defendant to show cause why the statement of defence should not be struck out or amended on the grounds that it tends to embarrass the fair trial of the action, and that it is irregular in mixing up defence and counter-claim, and in not showing what facts, if any, are relied on for the counter-claim, and in not heading the pleading "Defence and Counter-claim," if counter-claim is meant.

MR. HODGES, in support of the summons: The statement of claim is to the following effect:—1. By an agreement of mortgage duly registered under the Transfer of Land Statute, dated, &c., made and signed by the defendant as mortgagor to the plaintiff as mortgagee, to secure moneys then due by the defendant to the plaintiff, and also any future balance against the defendant in current account between the plaintiff and the defendant, the defendant, in consideration of the sum of £799 then due and owing by him to the plaintiff, covenanted and agreed with the plaintiff that he, the defendant, would pay to the plaintiff, the said mortgagee or its transferree, interest on the amount of the said balance of the said current account, and also on all such other moneys as aforesaid, or on so much thereof respectively as should from time to time remain owing and unpaid at the rate of £10 per centum per annum, such interest to be calculated from time to time on the daily debtor balance of the account by equal quarterly payments on certain days in every year.

2. The plaintiff agreed to accept interest at the rate of £8 per centum per annum, in satisfaction of the £10 per centum fixed by the mortgagee.

3. The defendant has not paid the said interest by the said quarterly payments, and the plaintiff claims £60. The statement of defence is as follows:

1. The defendant agreed with the plaintiff to rent 300 acres of land (with the option of purchase at £2 10s. per acre) at the rate of £10 per centum per annum on the purchase money, but such rate was ultimately reduced to £6 per centum.

2. That the defendant, who cannot read or write, was induced by the plaintiff's fraud to sign the agreement of mortgage relied on by the plaintiff.

PARTICULARS OF THE FRAUD.

The plaintiff represented that the land contracted for was 300 acres, and the said agreement of mortgage was on that quantity at £2 10s. per acre, whereas it was deficient by 41 acres.

3. That in ignorance of such fraud defendant paid in respect of interest on such deficiency the sum of £76, and after admitting £38 odd due to the plaintiff, the defendant counter-claims for the balance, namely, £37 odd.

Order XIX., rule 5, provides that the forms in Appendices C., D., and E., when applicable, shall be used for all pleadings. The form given in Appendix E., sec. 2, for a statement of defence and counter-claim, shows that the defence and counter-claim should be kept distinct and separate the one from the other. This has not been done in this case (*Crowe v. Barnicott*, 6 C. D. 753). There is a difficulty in knowing what defence goes to each paragraph.

MR. GAUNSON, to oppose: The defence says that the document was not a mortgage at all, but was a fraud. If the form of the defence and counter-claim is wrong, the defendant is entitled to leave to amend. The plaintiff knows that he is charged with fraud.

HIS HONOR said: I think this is a very proper application. If it were not made at this stage it could be made at the trial, which is a very objectionable

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mode of procedure. The first paragraph of the defence is no defence at all; the action is on a covenant, and this covenant is not denied. The defences sought to be set up by paragraphs 2 and 3 are such as I think do not lie in the defendant's mouth. The way the counter-claim is put in is in violation of Order XXI., rules 10 and 11 (*Holloway v. York*, 25 W. R. 627). I think in every aspect these pleadings are embarrassing, and must be struck out. Defence to be struck out unless amended before the 2nd day of February, 1885. Defendant to take any notice of trial for Ballarat the plaintiff can give. The defendant to pay the costs of this application, which, by consent, I fix at four guineas.

Solicitors: For plaintiff, *Hughes*, for *Randall*, *Mitchell* and *Nevett*; for defendant, *Gaunson*.

GRAHAM v. HAIG. Dec. 30.

Justices of the Peace Statute 1865 (*No.* 267), *ss.* 56, 57—*Rules of Supreme Court* 1884, *Order XXV., r.* 2—*Issuing a warrant on a Sunday—A justice of the peace has power to issue a warrant on a Sunday only in cases where the person sought to be arrested is charged with being guilty of an indictable offence—Points of law raised by the pleadings ordered to be tried before the trial of the action.*

Application on behalf of the defendant, calling upon the plaintiff to show cause why the proceedings in this action should not be set aside on the ground that the statement of claim discloses no actionable wrong; or failing that, why, under Order XXV., rule 2, the points of law raised by the defence should not be set down for hearing and disposal at some convenient day before the trial of the action.

DR. MACKAY, in support: The defendant is a justice of the peace, and the action is brought against him for having, on a Sunday, signed and issued a warrant for the apprehension of the plaintiff for having, as it was alleged, been guilty of insulting behaviour on that day. The statement of claim further says that on the case coming on for hearing it was immediately dismissed, and that in consequence of being given into custody the plaintiff suffered damage. The defendant, by his statement of defence, pleads, Not guilty by statute, and gives notice of objection to the statement of claim, inasmuch as it does not disclose a cause of action, but only sets forth an act which the defendant was authorised to perform in the course of his duty, and by virtue of his authority as a justice of the peace. The whole question in this action is whether the defendant had power, as a justice of the peace, to sign and issue a warrant on a Sunday. The Statute of 29 Chas. II., cap. 7, sec. 6, shows that a justice has that power. If a justice has power to do an act and acts within that power he is not liable.

MR. WALSH, to oppose: The power to issue warrants on a Sunday is dealt with in sec. 57 of the Justices of the Peace Statute. This section limits the power to indictable offences. The charge against the plaintiff was for "insulting behaviour in a public place," which is not an indictable offence, consequently the justice had no power to issue the warrant on the Sunday, and is liable for the consequences of his illegal act.

HIS HONOR said: I do not think that a warrant in a case of this kind can be issued on a Sunday. Sections 52 and 57 of the Justices of the Peace Statute give a justice power to issue a warrant on a Sunday against a person accused of an indictable offence, but the charge of "insulting behaviour" does not come within that category. There is no doubt that if a justice issue a warrant it does not matter whether the facts on which he issues it are correct or not, but he must act within his jurisdiction, and I do not think the defendant has done so in this case. I order that the question of law as to the jurisdiction of the defendant as a justice of the peace to sign and issue the warrant on a Sunday, and, assuming he has no jurisdiction, whether his so doing would render him liable to an action, be tried; but otherwise the summons be dismissed. Proceedings to be stayed pending the trial of this question. I give no costs on this application.

Solicitors: For plaintiff, *Husband*; for defendant, *O'Hea*.

PHILLIPS v. FITTS. Jan. 9.

Instruments and Securities Statute 1864 (*No.* 204), *sec.* 19—Regulæ Generales, 1*st Feb.*, 1854, *r.* 15—*Rules of Supreme Court* 1884, *Order LXIV., r.* 5*—*Vacation—Signing judgment in vacation—Judgments in actions under the Instruments and Securities Statute* 1864 *can be signed during the vacation.*

Application on behalf of the defendant calling upon the plaintiff to show cause why the judgment entered in this case by the plaintiff against the defendant on the 31st day of December, for default of appearance, should not be set aside for irregularity on the following grounds:—

1. That under Order LXIV., rule 5*, the time for entering an appearance to a writ of summons does not run between the 20th day of December and the 1st day of February.

2. That under Order LXIV., rule 5*, no judgment can be entered between the 20th day of December and the 1st day of February.

MR. MACDERMOTT, in support: The action is brought on a bill of exchange, and the writ was endorsed under the Instruments and Securities Statute. The writ was served on the 23rd day of December, during the vacation, but the defendant did not move for leave to enter an appearance, being advised that the plaintiff could take no steps in the matter during the vacation. The plaintiff on the 31st day of December signed judgment against the defendant for want of appearance. It is

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submitted that this signing of judgment is bad. Order LXIV., rule 5*, provides that from the 20th day of December to the 1st day of February no ordinary proceedings shall be carried on in the Court, nor shall any time run for the return of any process or doing any act during that period. Signing judgment is an ordinary proceeding and cannot be done within the dates named, hence the judgment in this case has been irregularly signed, and must be set aside.

MR. MITCHELL, to oppose: The practice to be observed in actions of this kind is set out in section 19 of the Instruments and Securities Statute. Until leave has been given to a defendant to appear in an action on a bill of exchange the procedure is under the Instruments and Securities Statute. No leave to appear has been given in this case, so that the plaintiff had a right to sign judgment under the Statute. Rule 15 of the "*Regulæ Generales* of the Supreme Court," 1st February, 1854, was to the same effect as Order LXIV., rule 5*, yet judgments in actions brought under section 19 of the Instruments and Securities Statute have always been entered during the vacation.

HIS HONOR said: The words of Rule 15 of the *Regulæ Generales*, 1st February, 1854, are substantially the same as the words of Order LXIV., rule 5*, and, therefore, the question to be considered is what is the meaning of the words "ordinary proceedings." Reading the words in the light of common sense this signing of judgment would come within the meaning of these words. On making inquiries, however, I find that the practice has always been to allow judgment to be signed in actions under the Instruments and Securities Statute in vacation, and I have no doubt that it was the intention of the framers of the rules that the same practice should prevail. I must say that if it had not been for this practice I should have allowed this summons, as I think the signing of judgment is an "ordinary proceeding." I believe my decision is utterly wrong, and that I am doing violence to plain words in holding that Order LXIV., rule 5*, does not apply on the ground that the signing of judgment under the Instruments and Securities Statute is an "extraordinary proceeding." It makes one ashamed to have to be always trying to twist points to come to a decision which will fit in with the decisions under the old procedure. It is the fault of the framers of the rules, who are unfortunately the judges. I dismiss the summons without costs. I order that the judgment do stand, but that the defendant have liberty to apply within three days for leave to enter an appearance to the action.

Solicitors: For plaintiff, *Levinson;* for defendant, *Duffett* and *Manton.*

PRACTICE COURT.

(Before His Honor Mr. Justice Higinbotham.)

Dec. 9.

GIFFARD V. THE UNITY GOLD MINING COMPANY.

County Court Statute 1869 (*No.* 345), *secs.* 35, 68 —*Prohibition—Name of attorney not entered in County Court book—Power of judge to reinstate case struck out—Where a judge has struck out a case on the ground that the name of the plaintiff's attorney is not entered in the book, he has power to reinstate the case and to hear and determine the case at the ensuing sittings.*

Application on behalf of the defendants for a prohibition, on the ground that the County Court judge had no jurisdiction to reinstate a cause after it has been struck out.

The plaintiff commenced an action in the County Court against the defendant company. The summons came on for hearing, and the objection was taken on behalf of the defendants that the name of plaintiff's attorney was not registered in the County Court book in accordance with sec. 35 of the County Court Statute. The judge held that the objection was a fatal one to the plaintiff's right to sue, and struck the case out with costs, reserving leave to the plaintiff to move to reinstate it. The plaintiff, in accordance with such leave, applied to have the case reinstated, and the judge ordered that the judgment should be set aside, and that the action be tried at the next sittings of the Court.

MR. GOLDSMITH in support; MR. BARRETT to oppose.

When this cause came on for hearing before the judge of the County Court, at Inglewood, on July 24th, 1884, the objection was taken by the defendant's attorney, that the plaintiff's attorney had not caused his name to be entered in the roll kept by the registrar of that Court, as required by section 35 of the Connty Court Statute 1869. The judge, instead of allowing the attorney to cause his name to be entered in the roll, then and there, as I think he might have done, or calling on the plaintiff and allowing him, if he thought fit, to conduct his own case in the absence of his attorney, as the judge ought, in my opinion, to have done, struck out the cause with costs, as upon a failure of the plaintiff to appear, reserving leave to the plaintiff to move to reinstate it. Subsequently the cause was reinstated by the judge upon application by summons in pursuance of leave reserved, the defendants appearing and resisting the application. The defendants now move for a writ of prohibition on the ground that the County Court has no longer jurisdiction to hear and determine the cause. Section 68 of the County Court Statute was not referred to in the argument before me. Where a plaintiff does not appear at the appointed time and place to support his claim, the proper course to take, in the absence of express statutory provision is to enter a non-suit. The judge had jurisdiction to strike out this cause as upon a failure of the plaintiff to

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appear by virtue of the authority given by this 68th section, and the same section gives to the judge power to order any cause so struck out to be reinstated if he shall think fit. I have no doubt that the judge had jurisdiction under this section to reinstate the cause even without the defendant's consent implied from the reservation of leave to the plaintiff to move for its reinstatement, and that the Court has jurisdiction to proceed, and hear, and determine the cause at the ensuing sittings. The application will be dismissed, with costs.

(Before His Honor Mr. Justice Williams.)

GOODWIN v. HEANCHAIN. Dec. 19.

Rules of Supreme Court 1884, *Order XX., r.* 1 (*a*), (*c*)—*Order XXVII., r. 1—Appendix C., sec. IV.—Instruments and Securities Statute* 1864 *No.* 204, *sec.* 19, *Schedule* 2—*Writ specially endorsed—A writ endorsed in accordance with Schedule* 2 *of the Instruments and Securities Statute, in an action brought under that statute, may be taken to be a writ specially endorsed under the Judicature Act.*

Motion under Order XXVII., rule 1, on behalf of the defendant, calling upon the plaintiff to show cause why the action should not be dismissed on the ground that no statement of claim had been delivered.

MR. FORLONGE, in support: The action is brought by the indorsee and holder of a bill of exchange. The defendant obtained leave to appear and gave notice requiring the delivery of a statement of claim. The five weeks allowed by Order XX., rule 1 (*c*), within which a statement of claim is to be delivered, has expired, and the defendant makes this application to have the action dismissed for want of prosecution. The writ in this action is endorsed in accordance with the form given in the Second Schedule to the Instruments and Securities Statute. The question is whether this endorsement can be taken to be a special endorsement under the Judicature Act. The case of *Smith v. Richardson*, 4 C. P. D. 114, decides that after a defendant has obtained leave to appear to an action under the Instruments and Securities Statute, the proceedings are to be governed by the procedure under the Judicature Act. The writ here, however, is a writ under the Instruments and Securities Statute, and the form of endorsement given under that Statute is very different to the form of special endorsement given under the Judicature Act. This endorsement cannot be taken to be a special endorsement, and as the time has gone by within which the plaintiff could deliver a statement of claim, the action should be dismissed with costs.

MR. M'INTYRE, to oppose: The plaintiff contends that this writ is a specially endorsed writ, and that no further statement of claim ought to be delivered under Order XX., rule 1 (*a*). The endorsement on the writ is in effect the same as the form of special endorsement given in Appendix C., sec. IV., No. 4. The defendant, on obtaining leave to appear, should have delivered his statement of defence.

HIS HONOR said: This is not an easy point, but I do not think I should be any clearer if I adjourned the consideration of it. The motion is made under Order XXVII., rule 1, on the ground that this is a case in which the plaintiff is bound to deliver a statement of claim within the time specified in Order XX., rule 1 (*c*), but has not done so. Mr. M'Intyre contends that the plaintiff is not bound to deliver a statement of claim, and founds his argument on the fact that the writ is a specially endorsed one. Mr. Forlonge contends that a writ, to be specially endorsed, must be a writ endorsed under the Judicature Act, whereas this writ is endorsed under the Instruments and Securities Statute. There is some force in that argument, but I am not disposed to give effect to it. The only point I have to consider is whether the writ is specially endorsed to the effect of Appendix C., Sect. IV. I am of opinion that it is an endorsement under another act, can be taken to be a statement of claim under the Judicature Act. If that be so this endorsement is a statement of claim, and the defendant should have delivered a statement of defence. I dismiss the motion; costs to be costs in the cause. I give the defendant 10 days within which to deliver his statement of defence.

Solicitors: For plaintiff, *Sabelberg*; for defendant, *F. S. Stephen, junr.*

REG. v. POOLEY, *Ex parte* SCARLETT. Dec. 19.

Local Government Act 1874 (*No.* 506), *sec.* 122, *Schedule* 11—*Ballot papers—Names of candidates in alphabetical order of surnames—Ouster granted on the ground that the names of the candidates at the election were not set on the ballot papers in alphabetical order.*

Order *nisi* to oust John Pooley from the office of councillor of the Shire of Towong on the grounds:—(1st) That the names of the candidates at the election were not set out on the ballot papers in alphabetical order, as required by sec. 122 and schedule 11 of the Local Government Act 1874; (2nd) That at the said election the returning officer disallowed and rejected a certain vote given thereat in favour of Scarlett; (3rd) That an unlawful vote was recorded by means of impersonation.

The argument was confined to the 1st ground, namely, That the names of the candidates at the election were not set out on the ballot paper in alphabetical order.

MR. FULLERTON, to show cause: It is too late now for Scarlett to take the objection that the names were not in alphabetical order. He ought to have objected at the time. The returning officer had power to postpone the election.

DR. MADDEN moved the order absolute. Sec.

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122 of the Local Government Act provides that where there is to be a contested election the returning officer shall cause ballot papers to be printed with the names of the candidates in full in the form in the Eleventh Schedule. The Eleventh Schedule provides that the candidates' names shall be arranged in alphabetical order of surnames. The returning officer is merely the creature of the Statute, and has no powers beyond what are conferred on him by the Statute. He has no power to adjourn an election under circumstances of this kind. He has power by section 139 to adjourn an election only where the proceedings at an election are interrupted or obstructed by any riot or open violence.

His Honor said: I think the objection raised is a good one. Section 122 provides that the ballot papers shall be printed in a certain form, and that form provides that the names of the candidates shall be printed in alphabetical order. This provision seems to have been made for the purpose of acting as a guide to illiterate persons. I am not at all satisfied upon the point, but I am disposed to think that the objection is a good one. I, therefore, make the order absolute without costs.

Solicitors: For Scarlett, *Tuthill* and *Dickson*; for Pooley, *Miles*.

Sittings in Banco.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

Dec. 9.

Reg. v. Shillinglaw, *Ex parte* Chine.

Reg. v. Shillinglaw, *Ex parte* Ah Sen.

Sale and Use of Poisons Act 1876 (*No.* 559), *sec.* 3—*Unauthorised sale of poison—Conviction—Form of conviction—Where a statute authorising the infliction of a penalty is silent as to the mode of levying for the penalty distress must precede imprisonment—Costs.*

Order *nisi* to quash convictions by justices at Maryborough, by which Chine and Ah Sen were fined 40s. each, with costs, for selling a poison, namely, opium, they not being legally qualified medical practitioners, nor holding a certificate from the Pharmacy Board authorising them to sell poisons. The prosecution was instituted by Mr. H. W. Shillinglaw, secretary to the Pharmacy Board. In the conviction made by the justices, it was directed that if the fine was not paid forthwith the defendants should be sent to gaol for 14 days. It was contended that this order was bad, inasmuch as the Sale and Use of Poisons Act did not provide for the means of enforcing the fine, and that, where an Act did not provide the means of enforcing a penalty a distress should in the first instance be levied, if the fine was not paid (*Ex parte Fat Tack*, 6 A. L. T. 37).

Mr. Donovan moved the order absolute; Mr. C. A. Smyth showed cause.

It was contended for the prosecution that, though the convictions were bad, yet that costs should not be awarded against Mr. Shillinglaw, as he was merely the servant of a public board.

The Court held that the convictions were bad, and that there was no reason for depriving the successful parties of their costs and made absolute the orders to quash the convictions with costs.

Dec. 9.

Reg. v. Hutchinson, *Ex parte* Jessell.

Pounds Act 1874 (*No.* 478), *secs.* 14, 15—*Fences Statute* 1874 (*No* 479), *sec.* 4—*Substantial fence—Sufficient fence—Trespass fees—The owner of cattle found trespassing on enclosed land is liable to pay trespass fees to the occupier of such land if enclosed with a "substantial" fence—Such fence need not be a "sufficient" fence under the Fences Statute* 1874.

Order *nisi* to prohibit the justices at Murtoa from enforcing an order made in a complaint by John Bodey against Edward Jessell for trespass fees. Nineteen head of cattle had trespassed on land of the complainant's, which it was alleged was enclosed with a substantial fence. The fence was a wire one, the distance from the lowest wire to the ground being 21in. The justices made an order for the trespass rates with costs, and it was sought to prohibit the enforcing of this order, on the ground that the fence was not a substantial one. By the Fences Amendment Act, section 4, a "sufficient fence" meant, *inter alia*, a substantial wire fence, at least 3ft. 6in. in height, having wires tightly stretched, with no greater distance between each of the three lowest wires or the bottom wire and the ground than 7in, etc. It was submitted that this definition of a fence should be considered as what was meant by a substantial fence, under the Pounds Statute and the Land Act 1869; and, therefore, that the complainant could not recover trespass rates, as he could not impound the cattle.

Mr. Hodges moved absolute the order to prohibit the enforcing of the justices' decision; Mr. Hood showed cause.

Mr. Justice Higinbotham, in delivering the judgment of the Court, said that the Fences Statute and the Pounds Statute were framed for different purposes, and the definition of a "sufficient fence" in the one act was not to be considered as defining what was a "substantial fence" in the other. The primary object of the Fences Statute was to give an occupier the power to compel his neighbour to join in erecting a fence between their lands, and the Legislature thought fit to describe what a "sufficient fence" was. In the other act, before any impounding could take place, there must have been a "substantial fence" erected, and it was for the justices to say whether it had been proved that there was a substantial fence or not. The order for prohibition would, therefore, be discharged.

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Dec. 9.

Re THE TRANSFER OF LAND STATUTE, *Ex parte* PECK.

Transfer of Land Statute 1866 *(No.* 301*), sec.* 117 —*Judicature Act* 1883 *(No.* 761*), secs.* 10, 19—*Rules of Supreme Court* 1884, *Order LXIII., r.* 2*—*Caveat—A judge in Chambers has power to hear applications to delay dealings with land under the Transfer of Land Statute* 1866.

This was a summons to the registrar of titles to delay dealing with a transfer of certain land at Nunawading pending the disposal of a caveat. The land, which consisted of 58 acres had been mortgaged to the Land Mortgage Bank. There was some dispute between Mr. Peck and the bank as to the amount due on the mortgage, and Mr. Peck lodged a caveat against any dealing with the land without notice to him. The bank sold the and to Mr. W. Loxton and Mr. W. E. Bryson, and proposed to give a transfer to them under the Transfer of Land Statute, and notice of this was given to Mr. Peck. The Transfer of Land Statute provides that every caveat lodged against a proprietor shall be deemed to have lapsed upon the expiration of 14 days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing; but if, before the expiration of the 14 days the caveator appears before a judge, and gives such undertaking or security, or lodges such sum in court as such judge may consider sufficient to indemnify any person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case the judge may direct the registrar to delay registering any dealing with the land for a further period to be specified in such order. In the present case an application was made to Mr. Justice Higinbotham, in Chambers, during the 14 days, but some question arose as to whether, under the Judicature Act, a judge in Chambers had now power to order a delay of proceedings connected with a caveat. The Judicature Act, section 10, provided that the Full Court shall hear and determine, *inter alia*, "all proceedings upon, or connected with, caveats under the Transfer of Land Statute," and it was contended that under this section the Full Court alone could deal with such applications. Mr. Justice Higinbotham granted an order to delay further dealing with the land, but referred the summons to the Full Court, in order that the question might be decided. It was submitted for the applicant, Mr. Peck, that by section 19 of the Judicature Act, taken in conjunction with order 63, rule 2, a judge in Chambers had power to deal with the application, otherwise, as the Full Court was not continuously sitting, injustice might be done to litigants. Section 19 enacted that "Provision shall be made by rules of Court for the hearing in Melbourne at all times by a judge of the Court, of all such applications as may require to be immediately or promptly dealt with." And order 63, rule 2, was to the effect that one of the judges of the Court shall be accessible for the hearing in Melbourne, at all times, of all such applications as may require to be immediately or promptly heard.

MR. BOX appeared for Mr. Peck; MR. A'BECKETT for the bank.

THE COURT held that the judge had power to hear the application to delay dealings with the land. An order was made to extend the time for delay in dealing with the property for one month to enable Mr. Peck to take proceedings to establish his claim to it, he to pay into Court, within five days, a sum of £100 to indemnify the Land Mortgage Bank against any damages which it might sustain in consequence of the delay.

BAULD V. WILLIAMS. Dec. 11.

County Court Statute 1869 (*No.* 345), *sec.* 120—*Appeal from the County Court—Appeal Case—Evidence—The judge of the County Court should give the Court of Appeal the benefit of the evidence he has been able to take in his notes, and should forward the exhibits which have been put in during the hearing.*

Appeal from the County Court, Melbourne.

MR. PURVES, MR. TAYLOR, and MR. BARRETT for the plaintiff (appellant); DR. MADDEN, MR. HOOD, and MR. JOHNSTON for the defendants (respondents).

The plaintiff, James Bauld, had sued the defendants, who were the committee for some sports at the Agricultural Society's Grounds at Numurkah, for damages for malicious prosecution. He had bought the right to sell liquor on the ground, but some question arose as to whether he had a right to sell on a particular portion of the ground, and as he refused to leave the place, he was given into custody as a wilful trespasser. The charge against him was dismissed by the justices. The action was then brought by him against the committee for malicious prosecution. Judge Cope nonsuited the plaintiff, on the ground that there was no evidence that the defendants did not have reasonable and probable cause for the prosecution, and the plaintiff appealed. After Mr. Purves had partly stated the case for the appellant,

MR. JUSTICE HIGINBOTHAM said that the case must go back to the learned judge of the County Court, in order that it might be amended. The action was for malicious prosecution, and the learned judge non-suited the plaintiff, on the ground that he had failed to show a want of reasonable and probable cause for the prosecution. It was a very difficult question to decide in actions of this kind whether there was evidence of want of reasonable and probable cause. And in dealing with the case in a manner consistent with justice, it was necessary that all the facts should be brought before the Court of Appeal. In the present case the Court was not placed in possession of facts which were absolutely necessary for it before it could arrive at a decision. Not one of the exhibits

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that had been put in evidence were in the case as furnished to this Court, although some of the exhibits constituted a portion of the evidence absolutely necessary to enable a determination to be arrived at as to one of the points of the case—namely, the state of mind of the prosecutors, who preferred the charge against the plaintiff. For instance, the licence under which the plaintiff sold liquor was not forwarded with the case. The Act of Parliament imposed a distinct duty on the judge of the County Court, who settled a case where the parties differed to, send up the evidence in a case of appeal. Where the parties differed, he was to state and sign a case. Giving full weight to the difficulties which a judge of the County Court had in taking down evidence in every case, still it was his duty to give the Court of Appeal the benefit of the evidence he was able to take, and to accompany it with the exhibits, to enable the Court of Appeal to form an opinion. In this instance it was impossible for the Court of Appeal to decide the matter, as some of the evidence was sent up in a shape that was unintelligible. Reference was in places made to shorthand notes, but those notes were not produced. The exhibits could have been sent up, for the judge had power to compel the parties to produce the exhibits before him. Appeals were in some cases open to objection. They aided the rich litigant against the poor one; they aided the litigant who was in the wrong against one who was in the right. But the Legislature had recognised that there were compensating advantages in the facts being more carefully or fully considered by the Court of Appeal, and in the renewed consideration given to them. But if the Court of Appeal was to do its duty, all the facts should be submitted to it in such a way that it could form an opinion on the merits. The case would be remitted to the judge to be amended.

Dr. Madden said that the judge, in settling the case had directed that the exhibits should be inserted, and it was the fault of the appellant that they had not been attached.

Mr. Justice Holroyd: The Act of Parliament imposes on the judge the duty of settling the case, and he ought not to throw it upon anyone else.

Mr. Barrett said that it was not the fault of the appellant that the exhibits were not forwarded with the case.

An order was then made remitting the case to the judge of the County Court to be amended.

Reg. v. Mary Martin. Dec. 11.

Judicature Act 1874 (*No.* 502), *sec.* 20—*A prisoner committed by justices to take his trial upon evidence showing a* prima facie *case against him on a particular charge can be presented against by the Attorney-General in the Supreme Court on a different charge—The proceedings provided for in the Justices of the Peace Statute for the commitment of prisoners were designed for the purpose of securing the attendance of the person charged with the offence at the Court where he is to be tried.*

Special case stated by Mr. Justice Williams on the trial of Mary Martin, for making a false statement for the purpose of the same being entered in a register of deaths. The case stated:—"The prisoner was tried before me, at the last sittings of the Supreme Court, in its criminal jurisdiction, on a presentment charging her, under the 33rd section of the Registration of Births, Deaths, and Marriages Statute 1865, with having wilfully made, for the purpose of being inserted in a register of deaths, a certain statement concerning the death of Ethel Mary Gresham—that is to say, a false statement that the name of the mother of the said child was Celia Gresham. The information against the prisoner in the Court below, and on which the prisoner was committed for trial by the justices, was for having committed an offence under the same section in having wilfully made, for the purpose of insertion in the register of deaths, a false statement as to the name of the said Ethel Mary Gresham, and otherwise as to the particulars required on the registration of the said death. Counsel for the prisoner objected that the prisoner could not be presented against in the Supreme Court on a charge different from that on which she had been committed by the justices to take her trial. I agreed to state a special case for the prisoner upon the point so raised. The jury found the prisoner guilty of the offence charged in the presentment, and I sentenced her to pay a fine of £5 to Her Majesty, and to be imprisoned till the fine be paid, but respited execution of the sentence until after the determination by their Honors the judges of the Supreme Court to this special case. The question for the consideration of and determination by their Honors the judges of the Supreme Court is, whether the objection raised by the counsel for the prisoner to the presentment is a good and valid objection or not."

Mr. Fisher appeared for the prisoner; Mr. Chomley for the Crown.

It was contended by Mr. Fisher that, as the prisoner was committed for trial for one offence, she ought not to be put on her trial for another offence. It was unfair to the defendant that when she was committed on one charge she should be asked to meet another.

Mr. Chomley said that no injustice had been done, as the defendant ought to have known that any charge that was disclosed by the evidence before the justices could be preferred against her in the Supreme Court. By the Judicature Act of 1874, sec. 18, it was provided that all treasons and misprisons of treason shall be prosecuted by indictment only, and all other indictable offences may be prosecuted by indictment or presentment, or, where a coroner has jurisdiction, by inquisition.

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In this case the Attorney-General had made a presentment against the defendant, and there was nothing in the act to limit his authority to make presentments on charges investigated before justices.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said that the case raised a simple question of law, whether a prisoner committed by justices to take his trial upon evidence showing a *prima facie* case against him on a particular charge could be presented against by the Attorney-General in this Court on a different charge. He did not remember that the question had ever been raised in this simple form till now. It was never doubted that the Attorney-General, as representing the Crown, had the power to bring before the Court any charge against any person against whom he had power to make a presentment. By section 20 of the Judicature Act, No. 502, it was provided that, "subject to the provisions herein contained, it shall be lawful for Her Majesty's Attorney-General or Solicitor-General for Victoria, or for any prosecutor for the Queen, in the name of a law officer, to make presentment at the Central Criminal Court, or at any Court of assizes or general sessions of the peace, of any person for any indictable offence cognisable by such Courts respectively, and every such presentment . . . shall be as good and of the same force, strength, and effect in the law as if the same had been presented and found by the oaths of 12 men"—that is, as if a presentment had been found by a grand jury. There was no limitation of the powers of the Attorney-General in that section. There was no limitation in the statute in relation to the commitment of prisoners upon charges for indictable offences. The proceedings provided for in the Justices of the Peace Statute for the commitment of prisoners were designed for the purpose of securing the attendance of the person charged with the offence at the Court where he was to be tried. The attendance must be secured either by committing the person charged to custody till his trial took place, or by requiring him to give bail to appear. The commitment was necessary to secure his attendance at the trial. But there was nothing in these provisions to interfere with the right of the law officers of the Crown to prefer a charge other than the one for which the accused had been committed. There was no reason for the limitation. There was no limitation on a grand jury on a bill before them. All they had to ascertain was whether a *prima facie* case had been established. They did not decide on the guilt of the person charged, but only whether there was a *prima facie* case against him, and in like manner the Attorney-General had power to make a presentment charging an indictable offence. There was no possibility of any injustice being done in any given case by a person being put on trial for a different offence from that for which he has committed by the justices. It was not conceivable that the Crown would attempt to do any injustice, but if any such attempt was made, the Court had power to prevent it, and would, if necessary, postpone a trial after the evidence for the Crown had been given to enable a prisoner to answer the charge; or if there were two different charges in a presentment, make the Crown elect on which of them it would proceed.

Conviction affirmed.

Dec. 12.

THE PRESIDENT, &c., OF THE SHIRE OF WARRNAMBOOL v. RAW.

Local Government Act 1874 (*No.*) *sec.* 253—*Rates—A person occupying a portion of a building which is not a rateable property is not liable to pay rates.*

This was a special case stated by way of appeal from a decision of the justices at Warrnambool making an order against the defendant for payment of rates on property, part of which was occupied by the defendant. It was contended for the defendant that he could not be required to pay the rates, inasmuch as the property formed part of school buildings, and was vested in the Minister of Education, and was, therefore, exempt from being rated.

MR. BOX appeared for the appellant; MR. HODGES for the respondent.

MR. JUSTICE HIGINBOTHAM, in giving judgment, said: Appeal from the decision of justices, by which the defendant was adjudged liable to pay rates. The defendant was rated in respect of a building vested in the Minister of Public Instruction, a portion of which was occupied by the defendant. The objection was taken that this building was not rateable property, being within the exceptions enumerated in section 253 of the Local Government Act 1874, and that the defendant was, therefore, not liable to be rated by virtue of his occupation of it. I think that the objection is a good one. The jurisdiction for the recovery of municipal rates is created by section 285, which defines the cases in which, and the modes by which rates may be recovered by the council. Questions like that raised in the present appeal must be decided by the terms of the Victorian Act of Parliament. English decisions under the English Acts of Parliament relating to poor rates afford us little assistance. Objections founded on the invalidity or badness of the rate as a whole, or in respect to any part thereof, are unavailing by the express language of section 285 to prevent the recovery of the rates. The section confers power to recover rates only in the case where a person rated under the provisions of the act fails to pay them when due from him for the space of 14 days after demand in writing by the council or their authorised collector. Objections founded on non-compliance with these conditions of liability are, of course,

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available. It is only a person rated under the provisions of this Act from whom rates are in any case recoverable; and rates are payable under the Act by persons in the character either of occupiers or of owners of rateable property. If an inhabitant of a shire is not an occupier, or if the property which he does occupy is not rateable property, he is not a person liable to be rated, and he is not in law "rated under the provisions of this Act," so as to be liable in proceedings brought against him for the recovery of rates. But in order to be exempt he must be a person who is not liable to be rated at all (*Heller v. The Mayor of Essendon*, 5 A. J. R., 165); or the property occupied by him must be property no part of which is rateable property (*Carlisle Company v. The Mayor, &c., of Sandhurst*, 5 A. J. R., 14.) The building in respect of which it was sought to make the defendant in this case liable was not rateable property, and the objection, therefore, was one which the defendant, in my opinion, could raise in answer to the claim by the council. The appeal will be allowed.

MR. JUSTICE WILLIAMS and MR. JUSTICE HOLROYD concurred.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

SKINNER V. M'KENZIE AND ANOTHER.

Rules of Supreme Court 1884, *Order XXV., r.* 4—*Doctrine of merger, when it applies*—*The doctrine of merger does not apply where the parties have expressed their intention that the simple contract shall not be merged in the higher security—Order of judge giving leave to appear and defend an action on a promissory note set aside on the ground that leave was obtained by an incorrect statement of facts.*

Application under Order XXV., r. 4, on behalf of the plaintiff for an order that an order made herein on the 14th November by His Honor Mr. Justice Higinbotham, granting leave to the defendants to appear and defend this action and all subsequent proceedings be set aside; or that the plaintiff's bill of costs be delivered and taxed, or for such other order as the circumstances of the case may require.

MR. SKINNER for the plaintiff; MR. POTTS for defendants.

The facts of the case appear from the judgment.

HIS HONOR: This action was brought to recover £61 16s. 6d. balance remaining unpaid of a promissory note for £80 made by the defendants in favor of the plaintiff, on June 11, 1884, for costs claimed by the plaintiff for professional services rendered in connection with the sequestration and the release from sequestration of the defendants' estate, one half of the amount being for costs already taxed. I granted an application for leave to appear and defend the action upon an affidavit alleging that the plaintiff admitted that he had received £58 15s. 6d., and that the defendants had, previously to the making of the promissory note paid him the sum of £23, amounting together to more than the whole amount of the note. This was an entire misrepresentation of the facts of the case, as they now appear. By a deed dated June 12 the day after the date of the promissory note, the defendants assigned to the plaintiff their book debts as a collateral security for the sum due at foot of the promissory note, and authorised him to collect the debts and to deduct his law charges from the amount collected. The total amount collected in pursuance of this authority was £98 15s. 6d., leaving, after a deduction of £39 13s. 6d. for law charges of collection, a balance of £19 2s. The plaintiff deducted this from £80 18s. 6d., the amount of the note and interest, and now sues for the balance. In answer to the present application it has been contended that the promissory note made on June 11 was merged in the deed of June 12, and that the plaintiff's action consequently was misconceived. If there has been a merger, the merger might be, and must be pleaded. But it would not be true that the promissory note had been given without consideration, as is alleged in the statement of defence. But has there been a merger? The doctrine of merger is based upon a doctrine of policy of the Common Law that there shall not be two subsisting remedies, one upon a covenant, and another upon a simple contract by the same person, against the same person, for the same amount; and that a simple contract security is in such cases extinguished by the specialty security given either as satisfaction or as security for the original debt whenever the latter creates a remedy co-extensive with that created by the former. It is true that the specialty security operates as a merger independently of the intention of the parties where the parties express no distinct intention, but it does not so operate where the parties have expressed their intention that the specialty security shall not have that effect, and that the simple contract shall not be merged in the higher security. See the case of *Synnot v. Parkinson*, 4 V. L. R (L.), p. 521, explaining and applying the proper limitation to an ambiguous dictum of Maule, J., in *Price v. Moulton*, 10 C. B., p. 56. I think that the parties to this deed have sufficiently expressed their intention that the promissory note made on the previous day should have a continued operation, and should not be merged in the deed. This appears from the different and not necessarily co-extensive remedy provided by the deed, and also from the recital that the deed shall be "collateral security" for the payment, not of the costs which are not mentioned in the deed, but of the promissory note upon which the defendants are stated by the deed to be indebted to the plaintiff. I think, therefore, that the defendants are liable on this promissory note. My order of November 14th, giving leave to appear and defend, and all subsequent proceedings will be set

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aside, and as the defendants obtained leave to appear by an incorrect statement of the facts, the costs of and occasioned by this application must by paid by them. I certify for counsel.

This order is made subject and without prejudice to the defendants making application for delivery of a bill or bills of costs and for taxation. I reserve leave to them to do so if they can show grounds for the application.

Solicitors: For plaintiff, *Farmer*; for defendants, *Potts*.

MENDELL v. M'LAY. Jan. 27.

Instruments and Securities (Bills of Sale) Statute 1876 (No. 557), sec. 16—Contract of Sale—Affidavit—Chattels retained by the vendor under a contract of letting and hiring after having disposed of the chattels under a contract of sale—The affidavit required by sec. 16 of Act No. 557, must give a description of the residence and occupation of the purchaser—The description of the residence and occupation of his agent or attorney is not sufficient.

The plaintiff in this action had obtained judgment against the defendant, and had issued execution. The sheriff, in pursuance of the execution, had seized a threshing machine and a steam-engine which were in the possession of the defendant, and which he proposed to sell to satisfy the judgment. A claim to these properties was made by Messrs. John Kyd and James M'Ilwrick, under a contract of sale made by M'Lay to them in August, 1881, in payment of a debt due to them of £110. Messrs. Kyd and M'Ilwrick, after the sale to them, let the properties to M'Lay, and they had since been in his possession. In consequence of the claim made by Messrs Kyd and M'Ilwrick, that they were entitled to the property, the sheriff obtained an interpleader summons in order that it might be determined whether the goods belonged to Messrs. Kyd and M'Ilwrick, or whether they could be seized by the creditors of M'Lay. The objection made to the claim of Messrs. Kyd and M'Ilwrick was that the residence of Mr. Kyd was not stated in the contract of sale and in the contract of letting and hiring, as required by the Bills of Sale and Amendment Act 1876.

HIS HONOR gave the following judgment: Interpleader summons by sheriff. The parties agreed to leave the question of the title to the property in dispute to my decision. The property seized, which consisted of a threshing-machine and a steam-engine, was claimed by the claimants, Messrs. John Kyd and James M'Ilwrick, under a contract of sale executed by the execution debtor, John M'Lay, on 8th August, 1881, in payment and satisfaction of a debt of £110, then due by him to the claimants. The *bona fides* of the transaction has not been questioned. The property, which is stated in the contract to be then in the occupation of the vendor, was let to him by the purchasers by a contract of letting or hiring bearing the same date. Both contracts were signed by M'Lay and M'Ilwrick in person, and by Kyd by his attorney, John Mackie. As possession was retained by the vendor, it was necessary, to prevent the sale being void, that both contracts should be in writing and filed in the manner provided by Act No. 557, sections 15 and 16. The latter section requires that there should be filed together with the contracts an affidavit of the time at which the same were respectively signed by the vendor and the purchaser, and a description of the residence and occupation of the vendor and purchaser—not, as in the case of a bill of sale, of the residence and occupation of the person making or giving the same only. The language of the Act of Parliament is distinct, and precludes the consideration of the relative importance of exacting compliance with its provisions from the vendor and the purchaser respectively. In the contract of sale John Kyd is described as "of Newstead, in the said colony," but in the affidavit it is stated that he was at the time of the execution of the contracts, "and still is, absent from Victoria." The "description of the residence" required by the law is the residence of the purchaser, and not the residence of his agent or attorney. Here the residence of one of the two purchasers, both at the time of signing the contracts and of filing the affidavit, is not given. The defect is, in my opinion, a fatal one, and I am compelled, reluctantly, to hold that this sale by the execution debtor to the claimants was void, and to disallow their claim. I order that the sheriff proceed to sell, and that he hand over the proceeds, deducting poundage fees, to the execution creditor, and that the claimant pay to the sheriff his fees and expenses as from 20th January to this date, together with three guineas costs, and three guineas costs to the execution creditor.

M'LEAN v. KNIPE. Feb. 2, 6.

Rules of Supreme Court 1884, Order XIV., rule 1—Scale of costs fixed—Such costs as fixed include costs of the judgment, but not those of counsel.

Application under Order XIV., rule 1, for liberty to enter final judgment.

MR. BRAHAM for the plaintiff; MR. ISAACS for the defendant.

HIS HONOR ordered that final judgment should be entered, but on the consent of both parties, reserved the question of costs. His Honor, after consideration, said: This was an action in which I made an order for final judgment under Order XIV., reserving the question of costs. The solicitors of both sides agreed to confer as to the amount of these costs, and I have been furnished with an estimate which both parties agree is a reasonable amount. I have had it examined by the taxing master because it may be convenient for the purpose of practice hereafter, that a certain amount should be fixed, and I find that the amount which the parties have agreed upon is very

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near to that which, upon taxation, would be found to be the proper amount. I now fix the costs of this action, which comes under the higher scale, at £13 19s. 4d., being the costs of attending and signing judgment. I will adopt the following scale in future in all applications under Order XIV. for entering final judgment:—

Costs on the Higher Scale.—In town cases, £13 19s. 4d; in agency cases, £15 9s.

Costs on the Lower Scale.—In town cases, £9 11s. 2d.; in agency cases, £11 8s. 2d.

All these amounts will include the costs of the judgment, but do not include the costs of counsel.

Solicitors: For plaintiff, *Braham* and *Pirani*; for defendant, *Godfrey* and *Bullen*.

THOMSON V. THE TASMANIAN FIRE INSURANCE COMPANY. Feb. 5, 9.

The Common Law Procedure Statute 1865 (*No.* 274), *sec.* 266—*Agreement to refer—Staying proceedings in action in policy of insurance until after arbitration—Materials of application insufficient—Two conditions essential to jurisdiction of Court to grant order to stay proceedings, the Court or a judge must be satisfied* (1) *that no sufficient reason exists for non-reference to arbitration; and* (2) *that the defendant was, at the time of bringing action, and continued to be, willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration—The burthen of proof of both conditions rests with defendant.*

Application by defendants under section 266 of the Common Law Procedure Statute 1865, to stay proceedings in an action upon a policy of fire insurance in a sum of £250.

The action was brought by the plaintiff as the assignee of the policy. The policy contained a condition "that in case any difference shall arise between the office and the insured touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all the parties." The defendants now sought to have the action stayed until the matter had been referred to arbitration.

MR. ISAACS in support of the application; MR. CAMPBELL to oppose.

HIS HONOR said: Application by defendant under section 266 of the Common Law Procedure Statute 1865, to stay proceedings in an action upon a policy of insurance against fire in the sum of £250. It was held by the Supreme Court, in *Farrell v. Imperial Insurance Company*, 10 V. L. R. (L.), p. 116, that the Court or a judge has no power under the words of this section "on such terms as to costs and otherwise as to such Court or judge may seem fit" to include in the order staying proceedings an order as to the costs of the arbitration. I dissent, with deference, from that decision, but I am bound by it. It renders it all the more necessary to consider with care the circumstances of each case that is presented to the Court or judge for the purpose of determining whether the application is one that ought to be granted at all. Prior to this enactment a stipulation in a contract to refer any difference that should arise to arbitration, although it was not nugatory, and would be the foundation of an action (*Livingston v. Ralli*, 5 E. & B., p. 132; 24 L. J. Q. B., p. 269) could not be set up as a defence to an action brought on the contract except in the particular case where it was stipulated that the ascertainment by arbitration of the amount to be recovered should be a condition precedent to the right to bring the action (*Scott v. Avery*, 8 Ex., p. 487, and see *per* Parke, B., at p. 406.) Since this enactment in section 266 became law, if parties choose to determine that they will have a domestic forum instead of resorting to courts of justice, a *prima facie* duty is cast upon courts and judges to act upon such an agreement (*per* Lord Selborne, L. C., in *Willesford v. Watson*, 8 Ch. App., at p. 480). But the exercise of the jurisdiction under this section is a matter of judicial discretion (*Wickham v. Harding*, 28 L. J. Ex., p. 215), and before acting upon such an agreement the Court or the judge must be satisfied, first that no sufficient reason exists why the matters in difference cannot be or ought not to be referred to arbitration according to such agreement, and secondly, that the defendant was at the time of the bringing of the action, and continued to be, willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration. These two conditions are essential conditions to the jurisdiction for an order to stay proceedings (*Martin v. Board of Land and Works*, 5 V. L. R. (L.), p. 117). The burthen of proving both of them to the satisfaction of a Court or judge rests in all cases upon the defendant. The evidence required to show that no sufficient reason exists why the differences ought not to be referred to arbitration must vary in character and amount in each case. In an action like the present, where the plaintiff sues upon a policy of insurance, the evidence, in my opinion, should be distinct and strong. The contract of insurance is a contract *uberrimæ fidei* in regard to both parties. If the insured has fulfilled his part of the contract, the insurer is bound promptly to make good the loss when loss has been incurred. A condition to refer differences touching loss or damage to arbitration, if applied by the insurer in strict good faith and without any unnecessary delay, may provide a convenient, speedy, and inexpensive means of settling such questions. It is capable, however, of being applied in bad faith, and may be readily made the means of delaying, or reducing, and even defeating a just claim. I think that the Court or a judge should require to be satisfied that the application is not made by the defendant for the purpose of delaying the plaintiff

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or compelling him to abate the amount of his claim. The actual amount of the loss as estimated by the defendant, the existence of other defences, if the defendant relies on others besides the question of the amount of damage, offers of settlement, if any have been made, and the times when they were made—these are some of the facts which, in my opinion, should be brought before the judge. In determining whether the matters in difference ought or ought not to be referred to arbitration, the judge should also know what all those matters are, and in addition I think that evidence should be submitted to satisfy him that the defendant is influenced in seeking arbitration by a *bona fide* desire to fulfil the special obligations imposed upon him by this contract, or at all events that he is not invoking the aid of the Court for the purpose of delaying and thereby oppressing the plaintiff. The terms of the agreement to refer in this case are as follow :—"And in case any difference shall arise between the office and the insured touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive, and binding on all parties." I am not satisfied in this case that no sufficient reason exists why the matter or matters in difference between the parties ought not to be referred to arbitration, or, which is nearly the same thing, I am not satisfied that sufficient reason exists why the matter or matters in difference ought to be so referred. The fire took place so far back as about May 3, 1884, and within a week afterwards the defendant company was informed, by an expert who was employed, that the loss did not exceed £40. The plaintiff's title to the policy by assignment dates from May 17, 1884. But no offer is stated to have been made to him, down to the present time, of the amount of loss admitted, although no fraud is suspected by the defendant. Neither does it appear that the defendant company is not relying on other defences besides the alleged excess in the amount of damage claimed. Under this condition all differences touching the loss or damage may be referred. The circumstances would be peculiar that would justify the sending one or some only of such differences to arbitration, leaving others to be dealt with in a Court of law with the result of further delay to the plaintiff. The materials on which this application has been made are insufficient. I refuse the order applied for to stay proceedings, with costs.

Solicitors: For plaintiff, *Davies* and *Campbell*; for defendants, *Blake* and *Riggall*.

COAD v. MAYOR OF ST. ARNAUD. Feb. 7.

County Court Statute 1869 *(No.* 345*), sec.* 43—*Form of summons and of the order following the summons to be observed in applications to remit actions under sec.* 43 *of the County Court Statute.*

Application under section 43 of the County Court Statute 1869 (No. 345), for the remission of an action to the County Court.

MR. BARRETT in support.

HIS HONOR said: A question has arisen as to the form of the summons and of the order following the summons which ought to be observed in applications of this nature. I think it follows as a consequence from the decision of Mr. Justice Williams, in *Taylor v. Port*, 6 A. L. T. 129, that the following are the proper forms to be used :—

FORM OF SUMMONS.

Let all parties concerned attend the judge in Chambers on ——, at the hearing of an application on the part of the defendant for an order that unless the plaintiff shall, within —— days give full security for the defendant's costs, to the satisfaction of the prothonotary of this honorable Court, or satisfy the said judge that he has a cause of action fit to be prosecuted in the Supreme Court. All proceedings in this action be stayed, or that this action be remitted for trial before the County Court at ——

FORM OF ORDER.

Upon hearing, etc., and upon reading, etc. It is ordered that, unless the plaintiff within —— days give full security for the defendant's costs to the satisfaction of the Prothonotary of the Supreme Court, or satisfy a judge of the Supreme Court that he has a cause of action fit to be prosecuted in the said Court, this cause be remitted for trial before the County Court, holden at —— [such direction as to costs as may have been ordered]. A form of order in applications of this kind is given in Appendix K., No. 45, to the rules. There is a misprint in the marginal note to the section under which these applications are made; and the form given does not contain the words "or satisfy a judge of the Supreme Court that he has a cause of action fit to be prosecuted in the Supreme Court." I think these words ought to be inserted, for if they are not so inserted the plaintiff would have no notice of the facts of his having an opportunity to satisfy a judge that the action was one which was a fit one for the Supreme Court.

VAIL v. GILMOUR. Feb. 7

Rules of the Supreme Court 1884, *Order XIX., rule* 6—*Appendix C, sec. VI., Nos.* 13 *and* 14—*Particulars—Striking out an amendment of reply—Misrepresentation and fraud alleged—Rule* 6 *of Order XIX. is imperative as to the insertion of particulars when fraud and misrepresentation are alleged.*

Application on behalf of the defendant calling upon the plaintiff to show cause why the second paragraph of the reply to the amended statement of defence in this action should not be struck out or amended by stating the particulars of the alleged misrepresentations and fraud.

MR. HODGES in support: To an action on a

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breach of contract the defendant has pleaded, amongst other things, that a deed was executed by the plaintiff in favour of the defendant. To this the plaintiff has replied that the deed referred to relied upon and mentioned, was obtained by the "misrepresentations and fraud" of the defendant, without setting out any particulars of the fraud or misrepresentation. Order XIX., rule 6, provides that in all cases in which the party pleading relies upon a misrepresentation, fraud, &c., particulars shall be stated in the pleading. The forms given in Appendix C, Section VI., Nos. 13 and 14, further show that particulars are necessary. If such particulars are not given the defendant would not be prepared to meet the charges.

MR. FULLERTON, to oppose: The reply is sufficient. The action is brought by a principal against his agent, so that the defendant knows all the circumstances of the case. Fraud is a matter of evidence. It would be almost impossible to set out a fraud. Order XIX., rule 22, provides that wherever it is material to allege fraudulent intention it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. The defendant has had the sole control of the plaintiff's business. The defendant bought this business from the plaintiff. Many representations were made which cannot be set out now. Particulars are not necessary where the facts are known to both parties.

HIS HONOR said: I think rule 6 of Order XIX. is imperative. It requires that the plaintiff should have stated in his reply the particulars of the misrepresentations and fraud which he alleges were committed. The question for the jury will be whether particular statements made by the defendant to the plaintiff were false and fraudulent. As the plaintiff will have to be prepared to prove at the trial that these statements were false and fraudulent. I do not see that he should have any difficulty in giving particulars of such statements now. If particulars are not given the defendant cannot tell what statements the plaintiff relies upon as being false, and thus the plaintiff would have an unfair advantage at the trial. The fact of the parties having stood in the relation of principal and agent would not effect the position of the parties. I allow the summons with costs, the plaintiff to have eight days to amend his reply; the defendant to have eight days to reply. I fix the costs by consent at three guineas, and certify for counsel.

Solicitors: For plaintiff, *Miles*; for defendant, *Farmer*, *Darvall*, and *Roberts*.

PRACTICE COURT.

(Before His Honor Mr. Justice Higinbotham.)

Jan. 27.

REG. v. ALLEY, *Ex parte* M'QUEEN.

Trade Marks Statute 1864 (*No.* 221), *sec.* 4—*Justices of the Peace* (*Prohibition*) *Act* 1877 (*No.* 571), *sec.* 4—*Amendment of Informalities Act* 1884 (*No.* 810), *sec.* 6—*Prohibition—Conviction—The Justices under sec.* 4 *of Act No.* 221 *have no power to order imprisonment in default of distress as a means of enforcing payment of the fine—An order so drawn up can be amended under sec.* 6 *of Act No.* 810—*The rule that costs should not be awarded against justices for errors committed in the discharge of their duties cannot be adhered to in future cases if justices do not enforce care and attention on the Clerks of Petty Sessions in drawing up the memorandum or minute of their decisions.*

Application for a rule *nisi* for a prohibition.

The applicant, George M'Queen, was convicted before justices of the peace on two charges brought under the 4th section of the Trade Marks Statute 1864, in the one case for placing spirits in a bottle bearing the trade mark of I. F. Martell and Co., and in the other for placing liquor in bottles bearing the trade mark of I. D. Kuyper and Son, with intent to defraud. In each case M'Queen was fined £100 to be levied by distress, in default of distress 12 months' imprisonment, the liquor seized to be forfeited.

SIR BRYAN O'LOGHLEN, in support of the application.

HIS HONOR said: Application on notice irregular in form, and apparently intended for the informant, was made to the Court on Friday last in these two cases for a writ of prohibition, or an order to quash two convictions, under Act No. 571, section 4. The applicant, George M'Queen, was convicted before justices of the peace on two charges brought under the 4th section of the Trade Marks Statute 1864, for placing spirits in a bottle bearing the trade mark, in the one case, of Martell and Co., and in the other case of Kuyper and Son, with intent to defraud. The minute of each conviction is verified by affidavit, and in form as well as in substance it exhibits want of care in preparation. It purports to be a "copy of minute of order," not "conviction," and it states, after reciting the charge, that there was an "order made for fine of £100, and with three guineas for costs to be levied by distress, in default of distress 12 months' imprisonment, liquor seized to be forfeited." This conviction is clearly bad. The 4th section of the Trade Marks Statute 1864, enacts the alternative punishment of a fine not exceeding £100, or imprisonment with or without hard labor for a period not exceeding 12 months, with forfeiture of the article. It does not authorise imprisonment in default of distress as a means of enforcing payment of the fine, and as the general procedure sections of the Justices of the Peace Statute 1865, do not provide imprisonment as a remedy for non-payment, as was held by the Supreme Court in *Reg. v. M'Cormack, ex parte M'Monigle*, and other cases last November (see *Australian Law Times*, vol. 6, No. 125, p. 105), the justices had no jurisdiction to award imprisonment except as a

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distinct alternative punishment. It was contended by Sir Bryan O'Loghlen that this defect of jurisdiction disclosed by the minute of the conviction was not a "defect in form or substance" within the 6th section of the Amendment of Informalities Act 1884, No. 810, which, it was argued, only applied to cases of valid conviction drawn up with material or formal omissions, but wherein the justices had jurisdiction, and that this conviction could not, therefore, be amended. If, however, the section be so limited, the power of amendment which it contains could not be exercised in any case of prohibition, which lies where there is a want of jurisdiction, or in many cases of *certiorari*, to all of which the section is expressly intended to apply. I am of opinion that this conviction is, in its present form, bad for a defect in substance, and that it can be amended either under this section of the Act No. 810, or under Rule 12 of Order 29, which is applied to proceedings in prohibition by Order 68, rule 2 (*a*). It was further contended that as the conviction had not been drawn up, the minute could not be amended at this stage. The object of requiring the memorandum or minute is not merely to allow an application for prohibition to be founded upon it, but to enable the Court to amend the conviction, if it be erroneously drawn (*Re Lewis*, 6 W. W. & A'B. (L.), 1). If the minute is not sufficient for both purposes, it is not sufficient for either. Another objection was taken to both convictions, namely, that the evidence did not disclose any intention to defraud. This, and a further objection to the first conviction that the trade mark of Martell and Co. was not on the bottle produced to the justices, raised questions for the decision of the justices, and do not furnish grounds for the present application. I order that the conviction be amended by striking out from the memorandum or minute so much of it as directs 12 months' imprisonment in default of distress. Costs, three guineas, to be paid by the informant to the applicant, George M'Queen. The amendment being made, the application for a prohibition or an order to quash is refused. It is a reasonable and most proper rule of practice that costs should not be awarded against justices for errors committed in the discharge of their often difficult duties. I will not depart from this rule in the present case, which is, I believe, the first of the kind that has occurred since the decision of the Court in *Reg. v. M'Cormack exparte M'Monigle*. But the rule cannot be adhered to in future cases if justices continue to disregard that decision, and do not enforce care and attention on the clerks of petty sessions in drawing up the memorandum or minute of their decisions. In the great majority of convictions and orders made by justices, imprisonment as a means, in default of distress, of enforcing payment of a fine or penalty, or of a sum of money ordered to be paid, is, in the present state of the law, illegal, and it is the clear duty of justices, by using due diligence and attention, to spare defendants the necessity of coming to this Court to save themselves from suffering an illegal infliction.

REG. v. TREMAINE. Feb. 4.

The Juries Statute 1876 (*No.* 560), *sec.* 38—*Application for special jury of twelve to be made ex parte—Affidavit in support—Grounds for desiring special jury should be stated—In an application ex parte by the Crown for a special jury to try a prisoner it is not sufficient to assume that the application is made in the interests of the accused.—Quære. Whether an affidavit is requisite in an application of this nature?*

Application under sec. 38 of the Juries Act (No 560), for a special jury of twelve men.

The affidavit in support of the application stated that Tremaine was on the 13th day of June last committed to take his trial at the Court of Assize to be holden at Hamilton on the 25th day of July, on the charge of setting fire to a fence. That the presentment was filed at the said Court against the said Tremaine, on the said charge, but as the jury were not able to agree they were discharged, and the prisoner was remanded to the next criminal sittings. That it would be expedient to the ends of justice that the prisoner should be tried at the next Criminal Sittings at Hamilton, before a special jury of twelve men.

MR. SMITH, in support of the application: The application is made *ex parte* on the authority of *Reg. v. Downey* (3 V. L. R. (L). 87). It would be to the prisoner's advantage to have the trial before a special jury.

HIS HONOR said: It does not appear whether an affidavit is required or not in an application of this nature, but I should suppose that it would be required. There is a distinction between a special and a common jury. The cause should be given for desiring a special jury. If an affidavit is required it should not be a mere formal one, as it is in this instance. When an application of this sort is made the reason for applying should be stated. I cannot assume that it is made by the Crown in the interests of the accused. I think that an application of this kind ought to be stated on special grounds. I do not say that this is not a proper case for a special jury, but I think that the grounds for desiring a special jury should be stated. I cannot entertain the application on the present grounds but the Crown can renew the application on further materials. *Crown Solicitor.*

Re THE LOCAL GOVERNMENT ACT 1874, *Ex parte* TAYLOR. Feb. 5.

Local Government Act 1874 (*No.* 506), *secs.* 158, 221—*Municipal Council—Passing and confirming regulation—Meaning of the words "not sooner than," in sec.* 158—*Four clear weeks must elapse before the passing of a regulation and its confirmation.*

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Rule *nisi* to show cause why a regulation should not be quashed for illegality on the grounds—1st. That the said regulation was confirmed by the Council of the Borough of Essendon *within* four weeks after the passing thereof. 2nd. That the minutes of the proceedings of the said council showed no authority to affix the seal of the said borough to the said regulation. The regulation was as follows:—"It shall be lawful to erect or construct a building for burning clay or other materials not less than 440 yards distance from any dwelling-house other than that occupied by those employed at such building for burning clay or other material within the Borough of Essendon.

MR. MITCHELL to show cause: The application is made under sec. 246 of the Local Government Act, No. 506. A company was started for the purposes of brickmaking, and the local council passed the regulation. The first ground of objection is based on sec. 158 of the Act No. 506. The regulation was passed at a meeting which took place on the 25th November, 1884, and was confirmed at a meeting held on the 23rd December, 1884. The council contend that the meeting at which the regulation was confirmed was held more than four weeks after the meeting at which the regulation was passed. Both the 25th November and the 23rd December fell on a Tuesday, so that to bring the time within four weeks both the first and the last day will have to be excluded. If either the first or the last day is included, then four weeks will have elapsed. As to the second objection, sec. 221 of the Act No. 506 requires that every regulation which is passed by a special order of the council shall be sealed with the common seal of the municipality. I submit that the resolution to pass a special order for making and passing a regulation carries with it the necessary authority to affix the seal.

HIS HONOR said: I am with you on that point.

MR. HODGES moved the rule absolute: I will only address your Honor on the first point. The words of the Act are, "not sooner than four weeks." The regulation was confirmed on the last day of the four weeks. Both fractions of a day will have to be excluded. The Court will only regard fractions of a day where it has to decide which of two acts done on the same day has been done first (*Reg. v. Justices of Middlesex*, 9 Jur., 758). If the Act had said that a certain thing was to be done not sooner than one day after, the one day would not have elapsed if the thing had been done the next day. One clear day would have to elapse, so here four clear weeks have to elapse. The words "not sooner than" is only another way for expressing "at least."

HIS HONOR said: The words "not sooner than four weeks" appear to me to amount to "not sooner than four clear weeks." The rule undoubtedly is that the Court will not regard fractions of a day unless it is necessary to decide which of two acts done on the same day was done first. Having regard to that rule, it is evident that four clear weeks must elapse between the passing of the regulation and its confirmation; that is, excluding both the first and the last day. I think the law is distinct. I may say that I am sorry to have to decide the matter in this way, but I have to declare the regulation invalid. The rule will be made absolute, without costs.

Solicitors: For the applicant, *Strongman*; for the Council of Essendon, *Malleson, England*, and *Stewart*.

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

In re JAMES QUISH.

Administration to creditor—Advertisement of order directed to next-of-kin to show cause within 14 *days held sufficient—In re Spinks followed.*

In this case Mr. Taylor had applied for letters of administration of the estate of James Quish to be granted to a creditor.

HIS HONOR said that the order as advertised directed the next-of-kin to show cause within 14 days after the publication of the advertisement why administration should not be granted to the applicant. The order should have been for cause to be shown after 14 days after the publication of the advertisement. However, he had previously held *In re Spinks* that that form of order was sufficient, and he would, therefore, grant the application.

SITTINGS IN BANCO.

(Before their Honors the Chief Justice, Mr. Justice Higinbotham, and Mr. Justice Holroyd.)

Dec. 15.

In re THE TRANSFER OF LAND STATUTE, *Ex parte* THE METROPOLITAN BUILDING SOCIETY.

Transfer of Land Statute, 29 *Vict.* (*No.* 301), *secs.* 2, 4, 15, 17, 21, 22, 25, 29, 34, 43, 135, 136, 152; 42 *Vict.* (*No.* 610), *secs.* 2, 3, 4; 33 *Vict.* (*No.* 353), *sec.* 11—*Summons to registrar to restrain issue of certificate of title—The Act No.* 610 *is declaratory—The Commissioner of Titles has power to enter upon a certificate the easement appurtenant to the dominant tenement the registration of which is applied for.*

This was a summons by the Metropolitan Building Society to restrain the Registrar of Titles from issuing a certificate of title to Mr. R. Byrne for some land at Richmond, with an endorsement of a right-of-way over some adjoining land owned by the building society. The case was argued some months ago before the Chief Justice, Mr. Justice Higinbotham, and Mr. Justice Holroyd, and judgment was now given.

MR. WORTHINGTON and MR. DUFFY appeared for Mr. Byrne; MR. WEBB, Q.C., and MR. A'BECKETT for the Metropolitan Building Society; MR. HIGGINS for the Registrar of Titles.

MR. JUSTICE HOLROYD read the judgment of the Chief Justice and himself as follows: Summons

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referred to the Court. The Metropolitan Permanent Building and Investment Society is registered under the Building Societies Act 1874, and its trustees are the registered proprietors of an estate in fee-simple in several parcels of land, comprised in a certificate of title issued on the 6th of January, 1875. Byrne in the early part of this year applied to have a piece of land described in his application brought under the operation of the Transfer of Land Statute, together with a right-of-way over a portion of one of the society's parcels to which it was contiguous. The society lodged a caveat forbidding the registration of the applicant as the proprietor of the easement claimed, and took out this summons calling upon the registrar and Byrne to show cause why a restraining order should not be granted against the registrar. The society denies the existence of the easement; but the question mainly argued before us was whether, assuming its existence, the registrar on bringing the dominant tenement under the statute would be justified in describing the easement in the applicant's certificate of title. Specifying it in his certificate would afford conclusive evidence of his title to it (No. 610, section 2); but, if it were not mentioned, it would be included as appurtenant to the land described (No. 301, section 4); and the land affected would remain subject to it, although not noticed as an encumbrance on the certificate of title to that land (No. 301, section 49). We may first consider how this case would have stood under No. 301 alone. To find out what land might be brought under No. 301, we should have consulted three sections, the 15th, 17th, and 29th. The 15th, which deals with Crown lands unalienated at the time of the commencement of that Act, and the 29th, which is concerned with certain leaseholds, have obviously no bearing upon the present matter. There remains the 17th section, which is confined to land "alienated in fee by Her Majesty before the 2nd day of October, 1862," that is before the commencement of the now repealed Real Property Act, and enumerates the persons by whom an application to bring such land under No. 301 may be made. The easement which Mr. Byrne claims was not alienated by Her Majesty at any time. He states in his affidavit that it was created in 1840 by the then owner of both the dominant and servient tenements, who conveyed away the one with a right of road over the other. If the word "land" in section 17 should be thought to embrace all incorporeal hereditaments, easements as well as others, still such an hereditament cannot be said to have been alienated before it came into existence. It was decided before the passing of No. 610 that it was not allowable to place on the register any easement affecting land which had not been brought under the statute. Why? "Because," as the Court observed, "there is no provision for showing on the dominant tenement any easement which may be appurtenant to it, though the use of the word 'land' will carry with it any easement which its owner can be proved by evidence external to the register to be entitled to enjoy in respect of his ownership of such land (*Ex parte Cuningham, re M'Carthy*, 3 V. L. R. (L)., 199, 204)." In that case as in this the dominant tenement was about to be brought under the statute. The Court referred to the 4th section, which enacts that the word "land" shall include hereditaments incorporeal, and in a certificate of title shall also include all easements and appurtenances appertaining to the land therein described, drawing a distinction apparently between easements appurtenant and other incorporeal hereditaments. But it relied chiefly on the 64th section, as indicating the only mode by which any easement can be put upon the register, namely, by a memorial to be entered upon the folium constituting the title to the servient tenement, or, to adopt the language of the judgment, by a blot on that title. The effect of the 17th section was not noticed in *ex parte Cuningham*; but it aids the view which the Court took, that in fact an easement could not be registered as a right (for which there was no necessity, as it went like other appurtenaaces with the corporeal hereditament to which it appertained), but could only be noticed as an encumbrance. In the subsequent case of *ex parte Beissel*, the Court, following the same line of reasoning, held that an easement appurtenent to land about to be brought under the Transfer of Land Statute could not be entered upon the certificate against the will of the proprietor of the servient tenement, notwithstanding that the servient tenement had already been brought under it (5 V. L. R. (L.) 53; see also *ex parte Brown*, Ib. 5). In the interval, however, the Act No. 610 had been passed, to which the Court appears to have hardly given due consideration, especially as regards the 4th section, to which its attention was not directed. Brief and obscurely worded as that Act is, we feel no doubt as to the intention of the Legislature. The 4th section should have come first. That section says—"The third schedule of the Transfer of Land Statute shall be deemed to extend to the setting forth of the easements mentioned in this Act." One easement—namely, a right of carriage-way—is specifically mentioned; easments generally are alluded to in sec. 2; and the Act itself is to be deemed a part of the Transfer of Land Statute, so that all easements contemplated by the statute may be treated as within the scope of the amendments. For the particular case with which we are dealing the carriage-way would be sufficient. Now the 21st section of the statute prescribes the form of the certificate by which land is to be brought under it—the form in the third schedule—which requires that the estate of the proprietor, the encumbrances (if any) to which his estate is subject, and the piece of land in which the proprietor is seised or possessed of an estate should be set forth. The piece of land

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must be delineated and colored on a map in the margin of the certificate, and must be described by area and locality. It is plain that according to this form an estate can only be registered in a corporeal hereditament. But if the form is to be enlarged by setting forth easements, those easements can only be such as the person applying to have his land brought under the Act is entitled to, for easements in derogation of his title would be encumbrances; and according to the decision in *ex parte Johnson* (5 W. W. & A'B. (L.) 55), they must also be easements appurtenant to that land, for easements in gross cannot be registered. Then sec. 3 of No. 610 becomes at once intelligible. Its meaning is that in a certificate of title to any dominant tenement, with a right of carriage-way over a servient tenement the words "right of carriage-way" are to be construed in the same enlarged sense as is given to the same words by the 64th section and 7th schedule of the statute when they are contained in any transfer or lease of freehold. The words to be read as if inserted in the certificate in lieu of the words "together with a right of carriage-way" are not precisely those of the 7th schedule, but the same *mutatis mutandis* adapting them to the case of a person becoming registered as proprietor instead of a transferree. The third section inferentially provides that when a right-of-way of this description is entered on a certificate the road or roads over which the right exists ought to be shown, and colored brown on a map endorsed just as they must appear endorsed on a transfer when a carriage-way is created by such an instrument (sec. 64). The Court, in the case of *Jones v. Park* (5 V. L. R. (L.) 169), doubted whether this requirement did not clash with the form in schedule 3 of No. 301, which, as already stated, requires the land brought under the Act to be be delineated on a map in the margin of the certificate. Really there is no discrepancy. Both the dominant tenement and the easement are described in the certificate. But the map showing the dominant tenement is on the face, and the map showing the land affected by the easement is on the back. The 3rd section speaks of the road or roads over which the easement is created, borrowing the exact words of section 34 of No. 301. That is an obvious inaccuracy; for no right-of-way can be created by a certificate, which is only evidence of title, although in most cases conclusive evidence. For the foregoing reasons we think the registrar has power to include by designation in the certificate of title to be issued to Mr. Byrne the right-of-way which he claims, if its existence is satisfactorily proved. But the society demands a restraining order on the further ground that the proof is defective. The society purchased the land over which the easement is claimed in January, 1875, and has been in possession ever since. About eight years ago one Beissel fenced it in, and to test his right, the society and its trustees brought two actions of ejectment against him in the Suprene Court, in one of which he confessed judgment, and in the other a verdict was entered for the plaintiffs. There is some reason to believe, but the facts are very imperfectly stated, that Beissel attempted to include the easement in a certificate which he subsequently applied for, but he was unsuccessful. It is this Beissel through whom Byrne claims by a conveyance dated 1st September, 1883. We have not before us any of the documents of title, or any materials which would enable us to determine whether the right-of-way really exists or not. We have only Byrne's statement that Thurlow was seised in 1840, and created the way, which are conclusions of law from deeds not exhibited. We do not know in what shape this case was presented to the registrar, or what documents were produced to him. The society can take no steps in any Court to get rid of the burden which, if the right-of-way does not exist, is about to be imposed upon its property, unless we can now put the matter in train for investigation; and the Legislature evidently intended that a caveator should have an opportunity of defending his interest before some one of the ordinary tribunals. Here, however, we are brought face to face with two serious obstacles. The proper course, if we have the power, would be to direct an issue. When the registrar is summoned before the Supreme Court under section 135 of No. 301, the power is expressely given; but section 24 does not point out in what way the Court can investigate a disputed title. Section 152 authorised the judges to make rules for regulating proceedings in the Supreme Court under the statute. Referring to section 24 our brother Molesworth said in *Hodgson v. Hunter* (3 A. J. R. 13), "I think the Court or judge might stay registration, bringing the parties before them, put doubtful questions into a course of legal determination within limited time, so as to uphold the policy of the Act shown in its preamble, to bring all titles into a state of simplicity. It would be, I apprehend, competent for the judges under section 152 to direct the details of such procedure." No rules have been made directing the details. But inasmuch as we must determine the matter if we have jurisdiction to entertain it, and some course of procedure is necessary for that purpose, we think we should be at liberty to prescribe the most convenient course, being one which we should have been empowered to prescribe by rule. The other obstacle is of a much graver character, and is, as it appears to us, insurmountable. Have we jurisdiction? Section 22 of No. 301 says that any person claiming any estate or interest in the land described in the advertisement (meaning an advertisement of application to have land brought under the Act) may lodge a caveat with the registrar forbidding the bringing of such land under the Act. The land (whether it be a corporeal hereditament alone, or a corporeal together with an incorporeal hereditament) which the applicant desires to have brought under the Act is necessarily

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the land to be described in the advertisement, and it is that land, and that only, or part of it, which the caveator may forbid to be brought under the Act. Suppose, then, that the land described is a corporeal hereditament, with an easement over the close of another person, who disputes the existence of the easement. How can such other person lodge a caveat? The land includes both the corporeal hereditament and also the incorporeal hereditament or easement, and he claims no estate or interest in either. He does claim an interest in a piece of land described in the advertisement, because in describing the easement it is necessary to describe in some way the tenement over which the right is claimed; but the servient tenement is not the land, or part of the land, which the applicant is seeking to have brought under the statute, and the owner of the tenement alleged to be servient cannot, by virtue of his estate in that tenement, forbid the registration of something in which he claims no interest, however incompatible the existence of that something may be with his own rights. If this construction is correct the caveat was improperly lodged. The Legislature, while allowing the claim to an easement to be established on bringing under the Act the land to which the easement is appurtenant, has omitted to provide means by which the claim may be contested. If this omission was unintentional the Legislature can rectify it. The summons must be dismissed.

MR. JUSTICE HIGINBOTHAM said: This is a summons calling on the Registrar of Titles and Robert Byrne, the applicant, to show cause why an order should not be made restraining the Registrar of Titles from bringing under the operation of the Transfer of Land Statute certain easements over land included in the application, and claimed by the caveators, the Metropolitan Permanent Building and Investment Society. I concur in the view expressed in the judgment of the Court respecting the principal question brought under our attention by this summons, to which the arguments have been almost entirely confined. That question is this—Has the Registrar of Titles legally the power to describe on the certificate of title issued to a proprietor of land a right-of-way appurtenant as an easement to the land which as the dominant tenement such proprietor has brought under the operation of the Act? If it had not been that views adverse to the existence of such a power have been expressed by this Court, I should have little difficulty in concluding that the intention of the Legislature to create this power was distinctly disclosed in the Transfer of Land Statute. It was the twofold purpose of that statute, as appears from the preamble, "to give certainty to the title to estates in land," by registering the title after it had been examined into and established by proof, and also "to facilitate the proof" of title by issuing to the proprietor of the land a certificate which should in all except certain specified cases be conclusive evidence of the existence and character of the title so registered. Effect has undoubtedly been given by the statute to the first of these purposes in regard to appurtenant easements. By sec. 4 the term "land" includes "all easements and appurtenances appertaining to the land described in every certificate of title, transfer, and lease issued or made under the Act." It follows by necessary consequence from this definition that, whenever land is brought under the operation of the Act, the easements appurtenant to that land, if it be a dominant tenement, or the easements annexed to that land as encumbrances, if it be a servient tenement, are whether the proprietor had intended it or not, and with or against his will, also brought under the operation of the Act. If the first purpose of the Legislature has been thus clearly carried into effect with regard to appurtenant easements, and if no reason appear in the provisions of the statute for withholding effect from the second purpose—namely, the grant of a certificate to facilitate proof of the title to the registered easement—it may be concluded, I think, in the absence of express words to the contrary, that the Legislature intended to carry its second purpose also into effect, and that it has authorised the issue of a certificate of title specifying easements. Every proprietor of land brought under the operation of the Act is entitled to receive a certificate of title to the same (sec. 43), and as appurtenant easements are included in and registered with the land, it would seem that the proprietor of a registered easement is entitled in the same way and upon similar conditions of proof of title as the proprietor of a registered corporeal hereditament to obtain a certificate as a matter of right. The form of the certificate of title contained in the third schedule, which is limited to estates in corporeal hereditaments, has been supposed to present an obstacle to this view, and to prohibit, by implication, the insertion in a certificate of the title to an easement. But this difficulty appears to be completely removed by sec. 136, which directs that the forms in this and all the other schedules may be modified or altered in expression to suit the particular circumstances of every case. I think it cannot be denied that the powers conferred by this statute on the commissioner for the purpose of fully investigating long and difficult titles were and still continue under the present law to be inadequate, and they may, in individual cases, prove wholly insufficient. But this fact furnishes no argument against the existence of power in the commissioner to institute the investigation into the title of the applicant to an incorporeal as well as to a corporeal hereditament, or to direct that the certificate of title shall bear on the face of it the title, if any, which has been established by that investigation. If the question were *res integra*, I should be disposed to hold, therefore, that further legislation for effecting this particular purpose was

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unnecessary. The Act No. 610, however, has put an end to doubts upon the subject, and must be regarded as over-ruling with authority all views to the contrary expressed in judgments of this Court. It is a declaratory, as well as an enacting Act, and since its enactment no room for reasonable doubt exists that the commissioner of titles posseses and must be taken to have always possessed the power to cause to be entered upon the certificate the easement appurtenant to the dominant tenement, the registration of which is applied for. Counsel for the caveators argued that the words in the fourth section of Act No. 610, "the easements mentioned in this Act" are confined to easements mentioned in the 64th section of the statute, that is, easements created by a transfer or lease of land under the Act, and that the fourth section only authorises the insertion in the certificate of title of the dominant tenement of those easements, which by section 64 are required to be entered as encumbrances on the certificate of the servient tenement. But this argument was answered at the bar when it was pointed out that section 2 clearly points exclusively to easements specified in certificates of title as rights appurtenant to the dominant tenement. The 4th section, therefore, rightly interpreted provides that the third schedule to the statute is to be deemed to extend to the setting forth in certificates of title of easements whether they affect the dominant or the servient tenement, and to authorise the insertion of one or the other in the certificate of title. In my opinion this summons should be dismissed, and the caveat should be removed. I base my judgment upon the ground that the registrar of titles has power to issue the certificate, and that he ought not to be prohibited by this Court from exercising that power in the present case. The judgment of the Court deals with other questions, which are not directly raised by the terms of the summons, and upon which we have not had the advantage of hearing argument. It has been suggested that the right of the applicant to this easement should be referred by means of an issue to be tried by a jury. I am disposed to think that we cannot yield to this suggestion. It must be remembered that land cannot be brought under the statute without the direction of the commissioner of titles, and, in order to enable him to ascertain and determine the applicant's title, inspection may be obtained for him by the applicant of all deeds, instruments, and evidences of title (Section 25), and he may reject the title, if the requisitions which he thinks proper to make are not complied with by the applicant without unnecessary delay (Act No. 353, Section 11). If the commissioner has not used the powers he possesses for investigating the title of an applicant, that fact ought to be brought before the Court on an application of this kind. If (as we ought to assume) he has used his powers, and if in addition a caveator neither furnishes evidence establishing his own title, nor shows that the evidence in support of the applicant's title is such that it ought not to be acted upon, I think that the Court should be slow to grant a summons like the present or to refer the question of title to a jury, even if the Court had the power to refer it. But in my opinion the Court has not jurisdiction to direct an issue for trial by jury in the absence of a rule of Court upon the subject, and I am not satisfied that the power, if it existed, should be exercised in this case. A still more serious difficulty, and one by which I understand the judgment of the Court in this case to be determined, has arisen out of the 22nd section of the statute. It is held by my learned brothers that this caveat has been unlawfully lodged, because the caveators do not claim in the language of that section "any estate or interest in the land described in the advertisement" of the applicant. It appears to me that the caveators do make such claim. The land described in the advertisement is the land described in the application in the form of the second schedule to the Act. Where the application is to bring an appurtenant easement either alone or, as in the present case, in conjunction with the dominant tenement under the operations of the Act, the applicant is compelled to describe in his application, and in the advertisement which follows the application, the servient tenement to which the easement is to attach as an encumbrance, and it is in the servient tenement that the caveators claim an estate or interest. Thus, in the present case, the applicant, Robert Byrne, makes application to bring under the operation of the Act certain land described by metes and bounds, "together with the full, free, and uninterrupted use, privilege, and enjoyment of the private or reserved road 33ft. wide, extending along the south boundary of the said road." The notice by advertisement directed by the commissioner follows the terms of the application, and the caveators claim an estate in fee simple in possession in that part of the land described in the advertisement to which the easement is attached as an encumbrance, that is to say in the road 33ft wide being the servient tenement. Thus the servient tenement is in all cases necessarily included in, and is a part of "the land described in the advertisement." According to the view taken in the judgment of the Court, the claim to an estate or interest in a part only of the land described in the advertisement would be a good claim whereon a caveat might be lodged. But it is proposed in effect to substitute for the words, "the land described in the advertisement," which the Legislature has employed, the words, "the land proposed to be brought under the operation of the Act," which the Legislature has not employed. If this can be done, the caveators cannot, of course, lodge a caveat, because they claim no estate or interest in the land of the applicant. But I do not think that such substitution is permissible. To

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confine the meaning of these words, "the land described in the advertisement," to the land sought to be brought under the operation of the Act, and to exclude from their meaning the servient tenement, which is in this, and in all such cases, land necessarily described in the advertisement, appears to me to be an arbitrary limitation of the natural and plain meaning of words: I am of opinion that the caveators had a clear right to lodge this caveat, and that the Court has jurisdiction to make an order thereon.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Williams).

THE HOP BITTERS MANUFACTURING COMPANY v. WHARTON. Dec. 19.

Infringement of trade mark—Injunction—Label—The test to be applied in cases of this sort is whether the amount of resemblance is such as would be likely to deceive an incautious purchaser not seeing or having the opportunity of seeing the two labels in juxtaposition, but seeing the one complained of singly and apart from the one which bears the registered design of the plaintiff.

This action was brought by the Hop Bitters Manufacturing Company against Jonathan Wharton, of Sandhurst, to restrain the infringement of a trade-mark of the plaintiffs.

MR. A'BECKETT for plaintiff; DR. MADDEN and DR. QUICK for defendant.

HIS HONOR, in giving judgment, said: This was an action for infringement of the plaintiffs' trade-mark claiming an injunction to restrain the defendant from further infringing by selling or exposing for sale any bitters in bottles bearing the label described in the third paragraph of the statement of claim. The infringement complained of substantially amounted to this, selling bitters in bottles bearing a label with a design thereon closely resembling a design which is the trade-mark of the plaintiffs, and which they place on the labels affixed to the bottles in which they sell their bitters. The defence substantially is that there exists no such resemblance between the design on the label used by the defendant and that on the label used by the plaintiff company as to constitute the selling bitters in bottles having labels attached on which is imprinted the first-mentioned design an infringement, or to justify me in granting the injunction sought. This is the question I am called upon to decide, and the test to be applied is this, whether the resemblance or (more correctly) the amount of resemblance is such as would be likely to deceive not a cautious but an incautious purchaser, not seeing or having the opportunity of seeing the two labels in juxtaposition, but seeing the one complained of singly, and apart from the one which bears the registered design of the plaintiff company (*In re Eno's Trade Mark*, 9 V. L. R., pp. 339-340). It is this test, then, that I have to apply for the purpose of determining the matter before me. If there be such an amount of resemblance, then I ought to find for the plaintiff company; if there be not, for the defendant. The plaintiff company is or has been engaged for some considerable length of time in the manufacture and sale of bitters, and about six months since the defendant began the manufacture and sale of bitters in Sandhurst. The plaintiff company's trade-mark as registered is "a sprig of the hop vine" with the words "Hop Bitters." According to the authorities in *re Leonard and Ellis's Trade Mark*, 26 C. D., p. 299, and others, the registration of the words "hop bitters" is of no effect, and cannot be regarded as giving the plaintiff company any special right to the use of those words; but the registration of the design of "a sprig of the hop vine" is efficacious, and *prima facie* gives the plaintiff company the exclusive right to the use of that design. I have, therefore, with the aid of and applying the test which I have mentioned, to consider and compare the two designs on the two labels, and then say whether the amount of resemblance is such as would be likely to deceive an incautious purchaser, who, not having the opportunity of seeing the two in juxtaposition, sees the one complained of apart from the one bearing the registered design. I have come to the conclusion that there is that amount of resemblance between the two labels. The sprig of the vine on defendant's label is not unlike the sprig of the hop vine on the plaintiff company's label on the first glance, even when the two labels are seen in juxtaposition, and to render the sprig of the vine on defendant's labels more likely to deceive incautious purchasers, who do not compare or have no opportunity of comparing the two, it is placed, as on the plaintiff company's labels, between the words "Hop"—"Bitters" printed in capital letters, "Hop" being above, and "Bitters" underneath the design. There was no necessity for using this particular design, nor for placing it in that particular position. It is not an appropriate but an inappropriate design for hop bitters, and though the question of motive may be to a great extent if not wholly immaterial, this fact, coupled with the evidence of the printer and engraver, William Holmes, who was called as a witness for the defendant, to the effect that defendant, after cautioning him "not to imitate the plaintiff company's label," left the arrangement and preparation of the label entirely to him, Holmes, seem to suggest a desire on the part of the defendant and Holmes to sail as close to the wind as possible. Holmes, indeed, appears to have exercised his talent upon the composition of the printed matter on the defendant's label in a way which is not only amusing but which cannot fail to be also highly instructive and edifying to the purchasing public. Having, therefore, come to the conclusion already stated, I order judgment to be entered for the plaintiff company, with damages 1s., with costs, and grant them the injunction they seek as claimee.

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VICTORIA.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham).

Feb. 6, 10, 11.

LAL LAL IRON CO. (NO LIABILITY) v. MULLIGAN.

Security for costs—Poverty or even insolvency merely is not a sufficient ground for an application for security for costs—Such application is in the discretion of the Court or judge—Where a "no liability" company has parted with all its property, and has not the means of carrying on its business, has no manager, and no registered office, such company, although not wound up, is equally inaccessible to the final process of the Court as if it were a foreign company, and will be ordered to give security for the defendant's costs.

Application on behalf of the defendant calling upon the plaintiffs to show cause why the further proceedings in this action should not be stayed until they had given security for the defendant's costs, on the ground that the plaintiff company was a "no liability" company, and has no property or assets of any description, and has no visible means of paying the defendant's costs, should a verdict be not found for the plaintiffs.

MR. ISAACS, in support: The defendant is sued as the Clerk of the Court of Mines. The action is brought to recover certain books and documents, and £1000 for their detention. The plaintiff company sold their mine to the Lal Lal Iron Co. Limited, and the books, etc., of the plaintiff company were deposited with the defendant in his official capacity, under sec. 23 of the Mining Companies Act, No. 409, as being the books and documents belonging to a company which had ceased to carry on business for a period of six months, without having been wound up. As the company was a no-liability company, and as it has sold all its assets, it is in the same position as a plaintiff who is out of the jurisdiction. No process of the Court could reach the plaintiff company, and so it ought to be compelled to give security for costs.

MR. MITCHELL, to oppose: The plaintiff company has never been wound up, and so is a going concern. It has no registered office or manager, but by sec. 15 of the Mining Companies Act, No. 409, process may be published in the *Gazette*, and such publication shall be deemed service upon the company.

HIS HONOR said: Application for an order that the plaintiff company shall give security for the defendant's costs. Poverty or even insolvency merely is not a sufficient ground for this application, which is made to the discretion of the Court or a judge. The plaintiff company has divested itself of all its property, including the books, for the detention of which it is now suing the defendant, a public officer, with whom they ought to have been deposited by the manager of the plaintiff company before his resignation in May, 1884, the company then having apparently ceased for more than six months to carry on business. These books have been received by the defendant in the course of his duty as the Clerk of the Court of Mines from the plaintiff company's assignees. The parting with its property by the company taken by itself might not be a sufficient ground for an order for security, but I can have no doubt that the plaintiff company, although it has not been wound up, has not had the means of carrying on business since the month of June or July, 1883. It does not appear that it has a registered office; it is not represented by a manager. It has virtually ceased indeed to exist. For all purposes of responsibility to the defendant, in the event of its failing in the litigation it has commenced, it is equally inaccessible to the final process of this Court, as if it were a foreign company. I think that the application should be granted, and an order made that the plaintiff company give security for the defendant's costs, by bond or otherwise, in an amount to be fixed by the prothonotary. Costs of this application to be costs in the cause.

Solicitors: For plaintiffs, *Smale, Hamilton*, and *Wynne*; for defendant, *Madden* and *Butler*.

Feb. 10.

Re BARRETT, A SOLICITOR, &c.

Review of taxation—Attendance of country solicitor at the trial and at the taxation of costs—The question, whether, under all the circumstances of the case, the attendance at the trial of the country solicitor as well as of his agent the town solicitor, has or has not been necessary, and whether upon taxation between either party and party or between solicitor and client, such double costs of attendance should be allowed or disallowed, is in the discretion of the taxing officer—A solicitor on taxation between solicitor and client will not be allowed an item which could not be recovered from the other side on taxation between party and party, unless the client, with knowledge that the sum could not be so recovered, has authorised the solicitor's action.

Application by Hugh Sunderland Barrett, a solicitor, for an order to review the taxation of his bill of costs in this matter for £90 18s. 6d. as to the two items of £28 10s., and £10 9s. respectively.

MR. BARRETT, in support of the application: The action arose in the country, but was tried in Melbourne. The affidavit of the applicant filed in support of the application states that the first amount, £28 10s., which was the balance of his charges for attending specially in Melbourne on the trial of the action after giving credit for the sums allowed on taxation as a witness between party and party, was disallowed by the taxing officer on the ground that, as he had attended the trial as a witness, and had been so allowed for on taxation between party and party, he was only

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entitled to be allowed his expenses as a witness, although the taxing officer held that his attendance in Melbourne on the trial as attorney to conduct the cause was necessary, and that the trial could not safely have been entrusted to his Melbourne agent. That the sum of £10 9s., which he claimed for attending specially in Melbourne to tax the plaintiff's costs on the judgment in his favor, was disallowed by the taxing officer, who stated in his opinion the attendance was necessary in the interests of the applicant's clients, on the ground that the affidavits did not show that the applicant had pointed out to his clients that the expenses of such attendance would not be allowed as between party and party. That the taxing officer also stated that he agreed with the applicant's assertion that a much larger sum was recovered from the other side that would have been recovered if the taxation had been left in the hands of the Melbourne agent, who did not conduct the cause, and knew nothing of the details. That at the time of the taxation notice of review as to the above two items was given. The sum of £29 10s. is the difference between the sum that would be due as a solicitor, and what was paid as a witness. Gordon on Costs, p. 195, states that it is in the discretion of the master as to whether the attendance of the country solicitor is necessary. The master in this case held the attendance necessary, but disallowed the costs.

It was contended on behalf of the client that, as to the sum of £28 10s., the allowance or disallowance of the costs of the attendance of the country solicitor was in the discretion of the taxing officer, and, as the taxing officer had refused to allow such costs, his decision would not be reviewed. As to the second item of £10 9s., as the solicitor had not informed his client that the costs of his attendance on the taxation would not be allowed between party and party, such costs would not be allowed (*Re Hardy and Madden, ex parte M'Iver*, 7 V. L. R. (L.) 145).

His Honor said: This is an application by a solicitor for an order to review the taxation as between attorney and client of two items of a bill of costs. The first item, £28 10s., which was disallowed by the taxing officer, represents the difference between the amount which the solicitor claims that he is entitled to receive for his attendance at the trial in his professional character, and the various sums received by him from the opposite party, on taxation of costs between party and party for his attendance at the trial as a witness, and also the attendance of his town agent. It is a question for the discretion of the taxing officer, whether, under all the circumstances of the case, the attendance at the trial of the country solicitor as well as of his agent, the town solicitor, has been, or has not been necessary, and whether, upon taxation between party and party, such double costs of attendance should be allowed or disallowed (*Bell v. Aitken*, L. R. 3 C. P., p 320). The taxing officer has a like discretion, I think, in a taxation between solicitor and client. In the present case, the taxing officer was of opinion that although the attendance of the solicitor at the trial in that character was necessary, yet as he had only claimed costs of attendance as a witness on the taxation between party and party, and had been allowed those costs, he could not claim from his client the costs of attendance at the trial in a different character. I think that this was a matter within the discretion of the taxing officer, and that he has exercised his discretion rightly. Costs of attendance at the trial will not be allowed to a solicitor in the two characters of a solicitor and a witness, and although in the present case the solicitor is willing to forego the amount already allowed him as a witness, the client would be a loser, if he had to pay the larger amount, which the solicitor might have recovered from the unsuccessful party, had it been applied for in time. The second item, £10 9s., represents the costs of attending specially in Melbourne to tax the plaintiff's costs of the judgment in his favour. The taxing officer disallowed the charge, although he thought that this attendance also was necessary and beneficial to the client, on the ground that the solicitor had not pointed out to the client that the expenses of such attendance would not be allowed as between party and party. Upon this point the officer has only followed, as he was bound to do, the strict and, it may be, the severe rule laid down in *Re Hardy and Madden, ex parte M'Iver*, 7 V. L. R. (L.), p. 145. If the sanction of the client is asked for a charge in excess of that authorised by the statute, he must be distinctly informed of the entire amount, and that a portion of it only can be recovered from the opposite party. I hold, reluctantly, that the summons must be dismissed, and with costs fixed by consent at 30s.

Solicitors: For Barrett, *Fink*; for client, *Malleson, England*, and *Stewart*.

(Before His Honor Mr. Justice Williams.)

Smith v. Musgrove. Feb. 12.

Rules of Supreme Court 1884, *Order XXXVI., rr.* 11, 17—*Appendix B, No.* 16—*Notice of trial to state at what assizes or sittings an action is to be tried.*

Application on behalf of the plaintiff calling upon the Prothonotary to show cause why a proper notice of trial should not be served herein upon the parties stating at what assizes or sittings the trial is to be held; and, why in the meantime, all further proceedings should not be stayed, upon the grounds that the document served herein, on the 4th day of February inst., and styled a "notice of trial," does not contain such information, and is not in conformity with the rules of the Supreme Court.

Mr. Phillips, in support; no appearance for the Prothonotary.

His Honor: I have instructed the Prothonotary

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to notify at what assizes or sittings an action is to be tried at the bottom of the notice of trial. The rule is very clear in terms, although unsatisfactory. I have also given instructions to the Prothonotary (so long as one judge only is sitting) to put only five cases in the list for each day.

PRACTICE COURT.

(Before His Honor Mr. Justice Williams.)

Feb. 13, 24.

Re GLENELG SHIRE, *Ex parte* SEALEY.

The Local Government Act 1874 (*No.* 506), *Section* 399—Mandamus — *Closed surveyed roads—A Shire Council cannot allow a landowner to close a proclaimed surveyed road passing between or through portions of his property, which by Act No.* 506 *is to be deemed to be required for public traffic, until the council and the minister have otherwise decided, and such decision has been published in the "Government Gazette." The fact that the application for a writ of* mandamus *has another legal remedy is no objection where the other legal remedy is doubtful, or where it is inadequate, or where the matter of which performance is sought does not admit of the delay generally attendant on legal proceedings, or where the enforcement or attempted enforcement of the other legal remedy might entail disastrous or inconvenient consequences—Wherever an Act of Parliament gives power to, or imposes an obligation on a particular person to do some particular act or duty, and provides no specific legal remedy on non-performance, the Court will, in order to prevent a failure of justice, grant,* ex debito justitiæ, *a* mandamus *to command the doing of such act or duty.*

Rule *nisi* for *mandamus* to compel the Shire Council of Glenelg to open a road.

MR. LEON moved the rule absolute. MR. HODGES showed cause.

MR. HODGES: The affidavit of the applicant shows that he is ratepayer of the Glenelg Shire, that there are certain proclaimed roads within that shire of which the road sought to be opened is one, that the road is obstructed, that it is required by the applicant for his use, that he sent a certain letter to the council on the subject. Other affidavits set forth the locality of the road, the letter sent by the council in answer to Sealey's application, and that the road was not required for public traffic. For the applicant in answer to these, affidavits were filed stating that the road in question was in a state of nature, that in order to make it of use a bridge, costing £200, would be required over a creek, that there were slip panels in the fence crossing the road. That a selector named Thomas Heckey was the only person likely to be benefitted by the opening and making of the road, and that he did not desire it. Littlebridge, the manager of the Merino Downs Station, through which the road ran, stated on affidavit that he had cautioned Sealey against trespassing, and that on subsequent proceedings against Sealey's son for allowing his bullocks to trespass, the son had been fined, that he believed this action was the result of these proceedings, and that he considered the road if made would not be used. An affidavit of Mr. Samuel, applicant's attorney, stated that there was no *Gazette* notice announcing the road to be not required for public traffic.

The granting of a *mandamus* is discretionary with the Court. If so, it would not be issued for the purpose of harassing any person, but only for some public good. The Court will not grant a writ of *mandamus*, which would be asking the Court to do something practically useless. *Mandamus* will not issue when there is any other legal remedy (9 B. & C. 456, *Reg. v. Paddington Vestry*). In this case no benefit to the person interested could be shown. Tapping on Mandamus, at page 10.—*Mandamus* not granted when a person has another legal remedy. Here the person has another remedy. He can cut down the fences. Tapping, at page 15.—The object of *mandamus* is to prevent a failure of justice. There must be a strong necessity for such remedy. Section 399 of the Act No. 506, referred to "every surveyed road." There was no evidence that this road had been surveyed road, although it has undoubtedly been proclaimed. My ground of objection is that this application is not for any benefit to the applicant but merely out of spite.

MR. LEON: When the whole of the materials before the Court are enough to warrant the Court in granting the *mandamus*, it should issue. Where a public duty is imposed by act of Parliament the writ must go *ex debito justitiæ*. Tapping on Mandamus lays this principle down in page 32. The broad principle of *mandamus* is laid down in the case of *Reg. v. Westminster Justices*, 1 W. 138. The principle of section 399 of the Local Government Act 1874, No. 506, is clear. A statutory duty is imposed on this council. They must "open and keep open" the road. Under section 38 of the Land Act 1869, No. 360, certain roads are dedicated to the public. When a road has been so dedicated the council has the duty imposed upon it. The council have, in this matter, disregarded the express wish of the Legislature. The fact of their endeavouring to show that only one person will be benefitted, is to say that these witnesses are wiser than the Legislature. Chopping down the fence would render the party so doing liable to pains and penalties.

The following authorities were cited:—*Reg v. Dean*, 2 M. & S. 80; *Reg. v. Severn Railway Company*, 2 B. & Ald.; *Reg. v. Bristol Dock Company*, 2 Q. B. 70; *Reg. v. Eastern Counties Railway Company*, 10 A. & E. 565; *Reg. v. Ouze Bank Commissioners*, 3 A. & E. 544; *Reg. v. Cockermouth Enclosure*, 1 B. & Ad. 378.

HIS HONOR said: This was an application

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made to me, sitting as the Court, on behalf of one George Sealey, for the purpose of compelling the Shire of Glenelg to forthwith open and keep open for public use and free from obstruction, certain roads delienated on certain plans exhibited before me. The main point involved in this application is one of very great importance not only to land-owners and selectors, but also to the general public. Shortly stated, it is whether a shire council can, notwithstanding the provisions to the contrary contained in the Local Government Act 1874, allow a land-owner to close a proclaimed surveyed road passing between or through portions of his property, and which, by virtue of the Act, is to be deemed to be required for public traffic until the council and the minister shall otherwise decide, and such decision has been published in the *Government Gazette*. I am clearly of opinion that as the Legislature have in the most unmistakeable and express terms imposed an imperative and absolute duty, as to the performance of which the council can exercise no discretion, on the council of every municipal district (from and after the expiry of the period of time mentioned in the Act) to open, and keep open for public use, and free from obstruction, every surveyed and reserved road required for public traffic and proclaimed under the Act, and which is within its municipal district, the council must perform the plain duty which Parliament has imposed upon it, and that this Court is bound to exercise its discretionary power (as to the issuing of a writ of *mandamus*) for the purpose of compelling a council which stands by, and, declining to interfere, allows a road falling within the definition contained in section 399 to be closed or obstructed to do its duty, and, by doing its duty to give effect to the clear and unmistakable policy of the Act.

In this particular case, however several objections have been raised, apparently on behalf of the shire, to the granting of this application, and with these objections it is right that in a matter of this importance I should deal *seriatim*. First, it is said that though the roads mentioned in the application in other respects fulfil the requirements of sec. 399, there is no evidence that the roads which the applicant seeks to have opened are surveyed roads. I think, however, that the various plans and maps which are before me taken in connection with the fact of proclamation afford evidence that the said roads are surveyed roads. Then it is said that even if these roads fall within the definition given in sec. 399, I, as the Court, should exercise the discretion which is vested in me as to the issuing of a prerogative writ of *mandamus*, by refusing the writ for the following reasons:—(1.) That the applicant is actuated by an improper motive in asking me to grant the writ. (2.) That he has no interest in the subject matter of the application. (3.) That granting the writ would be to compel the council to do what is useless. (4.) That the applicant has another legal remedy. Assuming objections 1 and 2 to be good in law I do not think the applicant is actuated by an improper motive and I think he has a sufficient interest so as to entitle him to make this application. He states positively in his affidavit (which I am not disposed to disbelieve) that he requires to use these roads for traffic, that he is a ratepayer of the shire, and that being a contractor he is especially interested in having the roads kept open, as from time to time he requires, and may require, their free use for the purpose of carrying on his contracts. It is true that the manager of the Merino Downs Station makes an affidavit against the application in which he suggests that the applicant is making the application out of spite because he had been fined for trespassing with his teams on the run, but it is not impossible that he trespassed on the run because roads which he desired to use were closed, and that finding he was not allowed to go through the run, which would have served his purpose equally well, he then determined to have the use of the roads. Then it is said that the effect of granting this writ would be to compel the council to do what is useless, and for this I am referred to the maxim *lex non coget ad inutilia* to Tapping on Mandamus, p. 15, and to Lord Tenterden's judgment in *Rex v. Paddington Vestry*, 9 B. & C., p. 456. In support of this objection it is urged that not only are these roads not used for public traffic but that they could not be so used. As to this, it is not impossible that the reason why these roads have not been more used than they have been, hitherto, is that the council has neglected its duty by allowing the roads to be obstructed in such a way as to effectually prevent their use; and in the affidavit and report in support of the other branch of this objection it is conceded that these roads could be used at any rate in dry weather for light carts. In addition to this, it must be borne in mind, that if the roads sought to be opened fall within the definition mentioned in sec. 399, they are to be deemed to be required for public traffic, and the council is given no discretion; an absolute duty is then at once cast upon them to do that which Parliament, under that state of facts, has commanded them to do. The effect of granting this application is not, it will be observed, to compel the council to make these roads, but only to compel them to remove these fences and locked gates, which completely bar the use of the roads. Lastly, it is said that the applicant has another legal remedy, and that, therefore, the writ should not be granted. This is, no doubt, in many instances a valid objection to the granting of the writ, but it is no objection where the other legal remedy is doubtful, or where it would be inadequate, or where the matter of which performance is sought does not admit of the delay generally (unfortunately) attendant on legal proceedings, or where the enforcement, or attempted enforcement, of the other legal

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remedy might entail disastrous or inconvenient consequences. Counsel for the shire contended that the applicant had another remedy herein by taking an axe and chopping down the fences. But this remedy, in addition to being, according to decisions, doubtful would be inadequate, and might entail consequences, the possibility of which might well be avoided. According to the law, as I read it by the light of recent decisions, a person is only entitled to chop down a fence obstructing a road, provided he at the time requires to use the road for traffic. Further, an attempt to so free the road from obstruction, might, and probably would, in some instances, lead to a breach of the peace. On this point, Tapping, at p. 30, says, "It is a general rule that wherever an Act of Parliament gives power to, or imposes an obligation on, a particular person, to do some particular act or duty, and provides no specific legal remedy on non-performance, the Court will, in order to prevent a failure of justice, grant, *ex debito justitiæ*, a *mandamus* to command the doing of such act or duty. And in the case of the *Queen v. The Bristol Dock Company*, 22 B., p. 70, in which the objection was taken that the writ should not be granted because the remedy by indictment was open, Lord Denman, in delivering the judgment of the Court, observed, "Those who obtain an Act of Parliament for executing great public works, are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this Court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them." I overrule all the objections, and make the order absolute for the issue of the writ. As to costs, though the point was not mentioned on the argument. According to the authorities, the costs of this application must be made the subject of a separate application at another time.

Feb. 16, 18.

REG. v. M'LEOD, *Ex parte* WATSON.

Local Government Act 1874 (*No.* 506), *secs.* 55, 120 —*Local Government Amending Act* 1883 (*No.* 786), *sec.* 6—Mandamus—*Where at a municipal election the candidate first on the poll is disqualified the candidate next on the poll is not entitled to be declared elected unless notice of such disqualification is given before the result of the election is made known. Where there has been an election "in fact" the candidate elected must make the declaration within two months of such election—Where there has been an election "in fact" a candidate may be "elected" within the meaning of sec.* 55, *Act No.* 506, *without being declared "duly elected" by the returning officer —Where there has been no election in fact, the declaration by the returning officer may be an essential preliminary before the elected candidate can make the necessary declaration.*

Rule *nisi* for a *mandamus* calling upon M'Leod, as returning officer for the East Riding of the Shire of Bairnsdale, to declare Robert Watson duly elected as councillor.

MR. HODGES, to move the rule absolute: The affidavits show that there was a vacancy on the 14th August, 1884. On the 16th August an election took place, and one Drevermann was declared duly elected. Neither the returning officer nor the electors knew that at the time Drevermann stood for election he was disqualified. The first intimation that the returning officer received of Drevermann's incapacity for becoming a councillor was by a letter, on the 22nd September, from Watson requiring him to declare him (Watson) duly elected. At the time of the receipt of this letter Drevermann had resigned and another election was held, at which Drevermann was again elected. Up to the present time Watson has not made the declaration required by section 55 of the Local Government Act, No. 506, nor has this declaration been entered, signed, and dated in the minute book of the council as is required by sec. 6 of the Amending Act, No. 786. If Watson was elected on the 16th August he has not complied with the provisions of section 55 of the Act, inasmuch as he has not taken the necessary declaration within two months of the election, and consequently the seat is vacant. As no notice of Drevermann's disqualification was given before the election, the returning officer cannot declare Watson duly elected, there must be a fresh election (*Reg. v. Hiorns*, 7 A. & E. 960).

SIR BRYAN O'LOGHLEN, to oppose: The word "elected" in section 55 means "duly elected." Until the declaration takes place the person is not duly elected, and until the person has been declared duly elected he cannot take the declaration. If one man only is nominated he cannot make the declaration until the returning officer declares him to be duly elected. The publishing in the local papers is the declaration of election. Sec. 61 of the Act provides that the old councillors shall continue in office until the new councillors are declared duly elected. This shows that a candidate has to be declared duly elected. Section 55 of the Act only commences to operate from the time when the candidate has been declared duly elected, but, as Watson has never been so declared, it cannot apply to him. The nomination of Drevermann was a nullity, and, as Watson was the only person nominated, the returning officer should declare him duly elected.

HIS HONOR said: This was an application made to me, sitting as a Court, to issue a prerogative writ of *mandamus* directing M'Leod, as returning officer of the east riding of the Shire of Bairnsdale, to forthwith declare one Robert Watson duly elected as councillor. The facts giving rise to this application are fully stated in *Reg. v. Drevermann, ex parte Watson*, reported in the

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Australian Law Times, vol. 6., p. 141, in which case I made an order absolute to oust Drevermann from his *de facto* position as councillor. Watson, as the only candidate, now claims that he is entitled to be declared elected to the office, and applies to me for a *mandamus* for that purpose. I do not think the writ should issue in the first place, because, though Drevermann was not qualified to be, or, rather, was disqualified from being, a candidate, no notice of such disqualification was given either to the returning officer, M'Leod, nor to any of the electors. In other words, the fact of his disqualification was kept secret until after the result of the election was made known. On this state of facts, according to the case of *Reg. v. Hiorns*, 7 A. and E., 960, the candidate next on the poll, who, in this case, would be and is the relator, Watson, is not entitled to be declared elected, and, if he occupied the position of councillor, would be liable to be ousted from it. In the second place, if Watson, by reason of Drevermann's disqualification, is to be considered as occupying the same position as if he had been elected, I am disposed to think his seat has become vacant, inasmuch as more than two months have elapsed since he was elected, and he has not made or subscribed the declaration required by section 55 of the Local Government Act, No. 506, and which by section 6 of the Amending Act, No. 786, is required to be entered, signed, and duly dated in the minute book of the Council. It is said in answer to this second view that "elected" in section 55 of the Act 506, means "duly elected," and that a person cannot be said to be "duly elected" until he has been declared elected by the returning officer. But where there has been an election in fact, I think a person may be "elected" within the meaning of the word in section 55 without any such declaration on the part of the returning officer. See section 135, which applies to the case where there has been an election in fact, also section 61, which in terms applies the expression "elected" to a councillor before he is declared duly elected. It is possible that the declaration may be an essential preliminary where there has been no election in fact, see section 120. In either view applicant must fail. I, therefore, discharge the rule *nisi* with costs as against the relator, Watson.

Solicitors: For Watson, *Atkyns*; for M'Leod, *Casey*.

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

Feb. 12, 19.

IN THE ESTATE OF BOYD.

Administration de bonis non *during the lunacy of the administratrix—Practice to be observed in application of such a nature.*

Application that letters of administration *de bonis non* be granted to Margaret Boyd, a daughter and one of the next-of-kin of the intestate during the unsoundness of mind of Isabella Boyd, the widow and administratrix of the intestate.

The deceased died intestate on the 19th February, 1881, and letters of administration were granted to his widow, Isabella Boyd, on the 12th May, 1881. The administratrix did not fully administer the property, and became of unsound mind and incapable of managing herself or her affairs, and was admitted to the Lunatic Asylum at Kew, on the 17th May, 1882, but no inquisition as to her lunacy has been had, nor has any committee of her person or estate been appointed. An affidavit sworn by the medical man and the nurse who had the care and management of the administratrix, stated that she, at the time of making the application, was a patient in the asylum, and that she is a lunatic, and totally incapable of managing herself or her affairs, or of doing any act whatever requiring thought, judgment, or reflection, and is not likely soon to recover the use of her mental faculties.

MR. NEIGHBOUR, for the applicant: I have not been able to find any authority for an application of this kind in our own Courts, but this is the proper application in England (Williams on Executors, 7th Ed., p. 517; *Evans v. Tyler*, 2 Robertson 134; *In re Joseph*, 1 Curtis 907; *In re Southmead*, 3 Curtis 28.

HIS HONOR said: I think notice of this application ought to be served on the sureties. I will consider the matter otherwise.

On a subsequent date Mr. Neighbour moved in the matter again, stating that the sureties had been served with notice as directed.

HIS HONOR said: This is an application to appoint an administratrix during the lunacy of the existing administratrix. The authority most like the present is *re Binckes*, 1 Curtis 286. If the administratrix is, as is represented in the affidavits, incapable of transacting business, I should be disposed to grant the application, but I think the fact of lunacy should be established against her, and that notice of this application should be served on her and on her sureties, and that an affidavit should be filed, by the person who serves her with the notice of this application, as to her conduct and deportment on being so served.

Proctor: *Casey*.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Higinbotham.)

JONES v. JONES. Feb. 3.

Marriage and Matrimonial Causes Statute 1865 *(No.* 268)*—Agreement between husband and wife to separate—Recitals in deed disputed by petitioner—Desertion—There can be no desertion by a husband if the wife is a consenting party to their living apart from one another—But her refusal to live with him unless he abandoned an adulterous connection is no evidence of such consent.*

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This was a petition by Jane Sophia Jones, praying for a dissolution of her marriage with her husband, Henry K. Jones, on the grounds of adultery and desertion for more than two years. The suit was heard in December, when judgment was reserved.

His Honor now gave judgment. He said: This was a suit for dissolution of marriage by a wife against her husband on the ground of adultery, coupled with desertion without reasonable excuse for two years or upwards. The adultery was clearly proved. Within a few months after the marriage which took place on July 24, 1877, the respondent renewed an illicit connection which he had formed before marriage. He subsequently committed adultery with another woman, with whom he has continued to live down to the commencement of the suit. As regards desertion during the period limited by the statute, the evidence is that early in the month of December, 1877, the respondent having treated the petitioner with coldness and unconcealed dislike during almost the whole of the short time which had elapsed since the marriage finally withdrew from cohabitation, and marital intercourse between the parties has never since been resumed. I am satisfied that there was no excuse for the gross misconduct of the respondent, and that the petitioner, whose conduct throughout has been blameless was, from the first, willing and anxious to live with him and discharge her duties as his wife, if he had been willing to fulfil his duties to her as her husband. On August 13, 1878, the petitioner wrote to the respondent, telling him of the reports which she had heard of him, offering to forgive him, and to live with him again if he could prove that the reports were false, and would promise to treat her in future as a husband should do, and stating that, if the reports were true she would not have anything to say to him, and would appeal to the Court for a divorce. The petitioner was fully justified in taking this course. She was not bound to return to the respondent while he was living in adultery with another woman. There can be no desertion by a husband, in the legal meaning of that term, if the wife is a consenting party to their living apart from one another. But her express refusal to live with him, except on condition of his abandoning an adulterous connection, is no evidence of such consent. It is an indication rather of her desire that the conjugal relation should be re-established, if he will remove the only existing obstacle. The respondent gave an insulting and brutal reply to the petitioner's advances. He admitted his cruelty to her, and the truth of the reports which she had heard, and declared his intention not to alter his conduct. He carried his intention into effect, and the petitioner from that time and ever since has had a continuing, just, and sufficient reason for not renewing her offer to return to him. The case so far presents no difficulties, and an explanation having been given of the delay in bringing the suit, I should have had no hesitation in concluding that there was desertion by the husband without reasonable excuse for two years and upwards, and that the petitioner was entitled to the relief which she asks, but for an incident disclosed by the evidence, which has been supposed to need, and which certainly did not receive, satisfactory explanation. By a post-nuptial settlement the respondent settled property upon the petitioner. Before the two years' desertion was completed, and while he was openly living in adultery with another woman, he begged the petitioner, through his mother, to grant him an allowance out of her settled property. The petitioner, at his mother's request, generously agreed to do so, and to execute a deed—a legal instrument to secure the allowance to the respondent. A deed of separation was accordingly prepared, and executed by the respondent, the petitioner, and the petitioner's trustees. This deed, after reciting that differences had arisen between the respondent and the petitioner, and that they had consequently agreed to live separate from each other for the future, and that an agreement had been made that the income of the trust fund should be divided in equal shares between them, in lieu of being paid to the petitioner alone, contained a covenant by the respondent with the trustees that the petitioner should and might at all times, notwithstanding her coverture, live separate and apart from the respondent. It was admitted by the petitioner's counsel that an agreement between the husband and wife to live apart, if in fact made within two years from the date of the husband's first desertion, as alleged in the recital to this deed, would be a fatal bar to the relief which the petitioner seeks in this suit. With a view of removing this difficulty, evidence was given by the petitioner and her two trustees that none of the parties to the deed had read it, or had had it explained to them, or knew anything about its contents and meaning at the time they executed it. None of the witnesses to the execution by the parties, nor the person who gave instructions for the preparation of the deed, nor the solicitor who prepared it, was called to explain the very remarkable circumstances under which this deed came into existence. I do not reject, as unworthy of credit, the evidence of any of the witnesses upon this point, though I should certainly require further and better evidence, if anything in this case turned upon the meaning of the deed, or the knowledge of the parties. Assuming that it may be true in fact that the petitioner did not know the nature of the instrument which he signed, and never read either it or the copy, which she caused to be prepared, and which she kept for her own use, her ignorance of its contents would not avail her, and if this were an action founded on the deed, she could not be heard in this or in any Court to dispute the truth of the

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recitals in it of material facts. But in the present suit, which, though it is between the same parties, is not founded on the deed, it is competent for either party to dispute the facts admitted by the recitals (*Carpenter v. Buller*, 8 M. & W., p. 209). I am at liberty, therefore, to go behind the distinct admission of an agreement to separate recited in this deed, and having regard to all the facts in the previous history of the married life of the parties. I conclude that no such agreement was ever in fact made, and that the petitioner did not at any time consent to the respondent's desertion of her. She is, therefore, entitled to the relief she has applied for. Decree *nisi* for a divorce, with costs, against the respondent.

(Before His Honor Mr. Justice Molesworth.)

SENIOR v. KINGSTON. Feb. 3.

Real Property Statute 1865 *(No.* 213*)*, *s.* 150—*Will —Agreement—Specific performance.*

This was a suit by John Senior, trustee and executor of the will of Mrs. Amelia S. Senior, to enforce an agreement made by him with two of her sons. The agreement was made after her death.

HIS HONOR, in giving judgment, said: Mrs. Amelia Sarah Kingston had various freehold estates at Williamstown; two cottages in Nelson-street, acquired in 1868; an allotment, No. 3, in a street near Electra-street, acquired before January 19, 1869; an allotment, No. 4, in the same street acquired before March 20, 1871. On June 22, 1871, she married the plaintiff, Mr John Senior. On August 29, 1872, she assigned part of allotment 4. On September 19, 1877, she deposited the certificate of title with a bank as security for advances. On August 7, 1880, a part of the land assigned on August 29, 1872, being purchased by him, was re-assigned to her. There was an hotel and shop on the north part of allotment 3, occupied by her tenants. After her marriage, she and her husband lived in a cottage built south of it. The rest of the land south was little used, but in some degree in connection with the cottage. After 1877 a hall was built by her, partly on allotment 4, south of the cottage. Mrs. Senior died November 4, 1883, leaving a will dated February 23, 1882, in words so far as material—"After payment of all my just debts, funeral and testamentary expenses, I give, direct, and bequeath to my son, Harrhy Kingston, the hotel known as the Morning Star, and the shop adjoining, together with the land on which such buildings are erected, for his own absolute use. The cottage adjoining the said hotel premises in which I now reside, I give and bequeath to my son Arthur George Lewis Kingston, together with the land, and desire that the measurements, shall not be interfered with, so as to leave both parties as they at present stand. With respect to the rest of my real estate acquired by me before marriage to my present husband, save and except my property in Little Nelson-street, Williamstown, adjoining Mr. Clarke's cordial manufactory, I give, devise, and bequeath the same to my two sons, Harrhy Kingston and Arthur G. L. Kingston, to be equally divided between them, and I direct that out of the whole thereof my present husband shall have a life interest for his own use, to receive the rents and profits thereof, and after his death same to be sold and disposed of, save as to said Little Nelson-street property before referred to, which I bequeath to my said son, Harrhy Kingston, solely out of the said real estate, for his own use and benefit. All real property purchased by me since my marriage with my present husband, John Senior, the titles to which I hold, I direct that my husband, John Senior, shall have a life interest therein for his own use, with full power to receive the rents and profits thereof, and after his death I direct the same to be sold and converted into cash, and the proceeds thereof equally divided between Wm. Parker Senior, son of my said husband, and my said sons Harrhy Kingston and Arthur George Lewis Kingston (with a provision for survivorship, and substituting the issue of her sons for them). I bequeath my personal effects unto my said two children equally; if unable to agree, then to be sold, and the proceeds divided; and I further appoint my said husband, John Senior, trustee and sole executor of this my last will and testament." This will presented many difficulties. At her death the secured debt to the bank was £600, the personal property trifling. The first question was if this debt should be thrown, under the Act No. 213, section 150, on the mortgaged land, or on the estates mentioned in the will, that firstly mentioned alone, or together with any and which of the others. There was then a question as to the times of the fencing between the several estates, and the extent of adjoining lands with the cottage at the time of the will, as to its passing with it; as to the words, "acquired by me before my present marriage," whether land she had before it, then sold, and then bought back, should pass; as to the cottages in Nelson-street, whether both, or only that adjoining the cordial manufactory went to Arthur. They were distinct as to title, fencing, and occupation. The same question occurs as to the meaning of "property acquired since marriage." Mr. Roberts, solicitor, who acted for Senior, the executor, laid a case before counsel as to the rights of the parties. It erroneously stated that the deeds of the property willed to the two sons of the testatrix, as well as the deeds of the property in which John Senior has a life interest, were deposited to secure debts. The certificate of No. 4 only was deposited. But the counsel before whom the case was laid adopted the opinion that the mortgage was charged on the devised land under the will, doubting on which of them, so that a mistake as to the mortgaged land became immaterial. After the death these questions were more or less

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discussed between the parties interested, the two Kingstons and the Seniors, father and son. The case and opinion were read by defendants, Mr. Roberts strongly urging them to come to an amicable adjustment. Mr. Senior claimed commission as an executor, and on June 6, 1884, an agreement written and read by Roberts, and signed by all four, was prepared in the words:—"We, the undersigned, agree to settle disputes as to the Morning Star Hotel and the shop adjoining, and the cottage, hall, and land in Gifford-street as follows:—Arthur Kingston, and Harrhy Kingston to pay all money due to the Commercial Bank at time of the death of their mother; to pay Mr. Senior £106 5s. commission on value of hotel, shop, hall, land, and cottage. Harrhy and Arthur Kingston to give up all their right to land at Yarraville, and Arthur to pay Wm. P. Senior £100, the hall, cottage, and land to be transferred to Arthur Kingston, and the hotel and shop to be transferred to Harrhy Kingston, all parties to pay their proportion of the duty, funeral, and testamentary expenses. The Little Nelson-street property to be transferred to Harrhy Kingston. All receipts and disbursements of the said hotel, shop, and hall to be adjusted, and any balance to be paid to Arthur and Harrhy Kingston, according to their respective interests; also the Little Nelson-street property. Wm. P. Senior to pay only one-fourth of his share of the funeral and testamentary expenses and duty; the other parties to pay his (Wm. P. Senior's) share in equal proportions."—Signed, John Senior, Arthur Kingston, Harrhy Kingston, William P. Senior. This document was a result of two evening discussions, and was read twice to all parties before signature. Each party to it got something as to which he had no claim, or a doubtful claim, and gave up something as to which he had some claim. They all acquiesce in it except Harrhy Kingston, and the conflict is between him and Arthur. Harrhy got under the agreement two cottages in Nelson-street, his right to part of one being questionable, his great grievance, as ultimately pressed, being that he was to pay half the debt to the bank, while the whole cottage, hall, &c., went to Arthur. Now, upon one construction of the will, the whole of the debts were thrown primarily on the hotel and shop, which he got. The day after the agreement he wrote to Roberts as to some rights of his as to *interim* receipts, showing that he had carefully weighed its contents as to liability for debts. The completing of conveyances was delayed by the necessity of having his property released from a sequestration in insolvency. The difficulty in determining his rights under the will turned upon points of its verbal construction, coupled with facts as to occupation of the lands, of which he was fully cognisant. His solicitor, Mr. Croker, on September 16, 1884, wrote a letter demanding a settlement under the will, not noticing the agreement. On September 22 Roberts wrote to Croker stating the agreement. On September 23 Croker wrote to Roberts, stating that Harrhy Kingston had signed under a misapprehension not particularly stated. There was never any assertion of mistake in the document, and there has been throughout no imputation on the fairness of the other parties to it or of Roberts. The Seniors gave up a claim in some aspects considerable, and Arthur has a right to argue upon concessions by them as a consideration. The action claim by John Senior is dated October 6, 1884. It seeks specific performance of the agreement June 6, in the alternative an execution of the trusts of the will. After careful consideration, I have concluded that the agreement should be specifically executed, having regard as to matters not distinctly provided in it to be contents of the will. I have felt doubtful about costs. There is no imputation on the plaintiff, and he is a trustee; the litigation has virtually been between the Kingston brothers. The agreement was somewhat hasty, as far as I can judge, between doubtful points of law and values not clearly shown. Harrhy made a bad bargain as to the bank debt. By the terms of the agreement, he is to bear half of it. Roberts understood that they were to pay it proportionately to the shares of each, throwing more on Arthur. I shall not give costs of suit as between litigants, but direct that the plaintiff's costs be paid half by the property taken by Harrhy Kingston, half by that taken by Arthur G. L. Kingston. Declare that the agreement of June 6, 1884, should be specially executed under the direction of the Court. Refer to the Chief Clerk to take all accounts necessary thereto, on account of the testatrix, especially that due to the Commercial Bank, and of her funeral and testamentary expenses, to apportion the same, on account of the sums due by or to the plaintiff, as trustee and executor of the will. Order the plaintiff's costs of this action up to this order, and in the Chief Clerk's office, to be taxed on the higher scale, and charged equally against the estates of the defendants, Harrhy Kingston and Arthur G. L. Kingston. Direct the Chief Clerk, so far as matters are left doubtful by the agreement, to refer to the said will. Direct the said Chief Clerk, in case the parties differ, to settle transfers of the estates comprised in the said agreement to be made to the parties entitled thereto at their respective expenses. Direct the Chief Clerk to settle the payment to be made to the parties respectively between themselves, continuing all the accounts to the making of his certificate.

(Before His Honor Mr. Justice Williams.)

Feb. 19.

SAMWELLS V. HACKETT AND ANOTHER.

Patent—Infringement—The question whether there has been an infringement of a patent or not is a question of fact peculiarly for the consideration of the jury.

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This action was brought by Henry Samwells, a coachbuilder, in Melbourne, against John Hackett, another coachbuilder, and George Mitchell, a cab proprietor, to restrain the defendants from infringing a patent of the plaintiff's, in reference to the making of hansom cabs.

MR. WEBB, Q. C., and MR. WORTHINGTON, for the plaintiff; MR. HOOD and MR. FORLONGE for the defendant, Hackett. The defendant Mitchell did not appear.

HIS HONOR, in giving judgment, said: This was an action for infringement of a patent. The defendant denied the infringement, and also set up other defences, from which, however, he was shut out, owing to his attorney not having delivered, with the defence, the particulars required by the statute. The simple question, therefore, that I have to decide is whether there was an infringement or not. This has been decided to be a mere question of fact peculiarly for the consideration of a jury (see *per* Tindall, C. J., in *Walton v. Potter*, W. P. R., p. 586), and it is, therefore, as a question of fact that I, sitting as a jury, have to determine the issue of infringement or no infringement. The invention, the subject matter of the patent as claimed by the plaintiff, is set forth in the specification in the following terms:—

"I claim as my invention the method of supporting and staying the shafts (I) by means of rods (JI) and stays (JII) in combination with a flat steel bar let into the framing, the combination and arrangement of the springs (F and G) and supports (H), and the combination and arrangement of these parts with all the others substantially as herein described and explained."

The plaintiff's so-called invention consists in connecting the shafts of a comparatively new vehicle known as a "brougham-hansom" with the body by means of letting into the framework of the front of the body two large flat steel bars and, by bolting to the framework, so stiffened and strengthened, two stays, the other ends of which are affixed to the shafts. The plaintiff has put in as an exhibit one of the steel bars let into the framework, with stay attached—in one piece so to speak—and a duplicate of this is affixed to the other side of the front of the vehicle. Seemingly it was the introduction of this new class of vehicle that suggested this contrivance to the plaintiff, for with the old style of hansom its application was not possible. Whether it be an improvement to the motion of the vehicle or not is a question which I am not called upon to decide, but there was a great deal of evidence that the vehicle would run easier and smoother without it, as it is stated that its effect is to make the shafts unduly rigid, and so occasion considerable shaking, particularly when descending hills. The plaintiff complains that the defendant has infringed his patent by fixing on to a certain brougham-hansom a stay which has also been put in as an exhibit, but which differs in some material respects from the stays affixed by the plaintiff, and in the manner of affixing. There is no ground for assuming that the defendant affixed the stay in question with any intention of infringing the plaintiff's patent, or indeed with even any knowledge of the existence of the patent. The evidence adduced before me negatives both these views. Now the first thing that strikes one in considering this matter is, that if the connecting the shafts with the body by means of these stays be an infringement it is so simple and obvious an expedient that one would have thought the applicant would have had great difficulty in patenting these stays alone, had it not been for the claim of combination with the steel bars let into the front framework of the vehicle. There is no pretence for saying that the defendant has infringed the combination. Therefore, if it be the combination that has been patented, as I am disposed to think is the case, the plaintiff's case fails. Defendant has never used the steel bar at all; he has only affixed his stay to one vehicle—he only affixed one stay, not two, of a different shape, in a different manner, and to a different point of the shafts, and he has affixed it to the front framework as it stands, and without stiffening or strengthening the framework in any way. But regarding for the moment the claim patented not as a combination, has the affixing by the defendant to one of these vehicles of the stay produced been an infringement of the plaintiff's patent? From a comparison of these two exhibits, and the manner in which they were respectively affixed, the differences are noticeable. The plaintiff affixes two separate and distinct stays, each of larger dimensions than the defendant's stay, each bolted in the front framework of the vehicle after it has been strengthened and stiffened with the steel bars, and each affixed at a different point to the shafts to that at which the defendant's stay is affixed. The defendant's stay is smaller, lighter, is welded in one piece, much simpler, and less cumbersome. It is so formed that this one stay serves the purpose of the two stays of the plaintiff. It is and can be used without any alteration of or letting into the framework of the vehicle; in other words, it is used without the heavy appendage of the steel bars, and is affixed considerably nearer to the centre of the back of the shafts, thereby giving, according to the evidence, greater play and elasticity to the shafts. In my opinion this stay of the defendant's is substantially a different invention, no doubt obtaining the same object, and effecting the same purpose, though in a more advantageous way. It appears to me to be a decided improvement upon, and in many of its features a substantial departure and variation from, the plaintiff's invention. Tindall, C.J., in the case of *Watton v. Potter*, already cited, says, "Now there can be no doubt whatever that although one man has obtained a patent for a given object there are many modes still open for other men of ingenuity to obtain a patent for the same object. There may be many roads leading to one

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place, and if a man has, by dint of his own genius and discovery after a patent has been obtained, been able to give to the public, without reference to the former one, or borrowing from the former one, a new and superior mode of arriving at the same end, there can be no objection to his taking out a patent for that purpose." I have come to the conclusion that, whether viewing the invention which plaintiff has patented as a combination or otherwise, the defendant has not committed an infringement. I, therefore, order judgment to be entered for the defendant, with costs to be taxed.

(Before His Honor Mr. Justice Molesworth.)

PETERSON v. PARDY. Feb. 23.

Administration of estate under the direction of the Court—Administratrix illiterate—Form of direction and declaration.

This was a suit by a married daughter of one John Pardy and her husband against Pardy's widow and administratrix to have the estate of the deceased administered under the direction of the Court, for accounts to be taken of the sums received and expended by Mrs. Pardy out of the estate, and for payment to the plaintiffs of what should be found due on the taking of the accounts. Pardy died in 1853, leaving a widow (the defendant) and several children. He had owned a farm at Moonee Ponds. After his death the defendant carried on the farm, and as she said she spent all the personal property left by her husband on the maintenance of her children, and when that was exhausted she supported them by her own exertion, she had kept no accounts, and could not furnish any. A sum of £30 had been paid to Peterson. Peterson was married to his wife in 1875, and since then Mrs. Peterson had not lived with her mother.

MR. NEIGHBOUR appeared for the plaintiffs; MR. GOLDSMITH for the defendant.

HIS HONOR said that John Pardy died in April, 1853. The widow took out administration to his estate. This suit was brought by one of her daughters and her husband to obtain administration of the estate. The defendant did not say that she had discharged the shares of her children, and there was no Statute of Limitations in such a case. The female plaintiff lived with her till 1875, and was supported by her. Two sums of £20 and £10 had also been paid by her to the male plaintiff. After the plaintiffs had married in 1875 the female plaintiff had ceased to live with her mother, and she now wanted her share of the property. The defendant was an ignorant, illiterate woman, and had kept no accounts, but that did not entitle her to retain the estate, and he would, therefore, make a decree for accounts. Direct the chief clerk to take accounts of the personal estate of John Pardy, deceased, which came to the hands of the defendant, Letitia Pardy, as his administratrix; also, an account of his debts, general and testamentary expenses paid by the said defendant, and to strike a balance showing the amount with which she is chargeable for his next-of-kin; and, if so required, to take an account of the amount due to each of the next-of-kin as their proportion thereof. Declare that the plaintiff, Esther Peterson, is entitled to two-fifteenths of the said balance, with interest thereon at the rate of 8 per cent. per annum, from a year after the death of the said John Pardy, April 10, 1854; but that, up to the date of the said plaintiff's marriage, June 24, 1875, her maintenance should be set off against the said interest; and that the said defendant should also have credit for a sum of £30 as paid to the plaintiff, Peter Peterson. Reserve further directions and costs. Liberty to apply.

SOUTH AUSTRALIA.

SUPREME COURT.

IN BANCO.

(Before Way, C.J., Boucaut, J., and Bundey, J.)

REG. v. BOLTE. Dec. 11.

Fraudulent intent—Appropriation of trust moneys by trustee—B. was charged on an indictment with having fraudulently appropriated certain moneys which he held as trustee under the will of one G. At the trial it was proved (1) *that under the will B. was to pay G.'s widow for life the interest on the money bequeathed, and that at her death the* corpus *was to be distributed;* (2) *that for some time B. paid the beneficiary her interest, but subsequently failed to do so;* (3) *that B. drew cheques on the trust fund account which purported to be for loans to third parties, and which cheques were subsequently paid into B.'s own private account.* Held—(1) *That under these circumstances there was no evidence to go to a jury of a fraudulent conversion; and* (2) *that when a cheque purports to be drawn from a trust fund for a specific purpose, the presumption is that it has been rightly applied, and the onus rests with the Crown of rebutting such presumption.*

This was a case reserved from the Mount Gambier Circuit Court.

The defendant Bolte was charged under section 204 of the Criminal Law Consolidation Act with fraudulently appropriating certain trust moneys. It was proved by the Crown that two cheques drawn by Bolte on the trust account for £85 and £120 respectively, and purporting to be for loans on account of the trust fund were paid by Bolte to his private account. On the other hand, it appeared from the evidence, which was given in German, doubtful whether the *corpus* was understood by the life beneficiary to be "lent out to" or "loaned out by" Bolte. That under the will the defendant was to pay Mrs. Graunitz the interest on the *corpus* during her lifetime; that for some time Bolte paid the interest, but subsequently failed in his payments; that he was doing a large interest, had a considerable overdraft, and it was not shown that

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he was in insolvent or embarrassed circumstances at the time he made the appropriation.

SYMON, Q.C., for the defendant: Although the defendant had committed a breach of trust there was nothing in the evidence to show fraudulent intent. Bolte's duty was to invest the money and pay the life beneficiary the interest accruing, and so long as he did this and was able to pay over the *corpus* at her death he was properly administer. ing his trust, even though he lent the money to himself. Failure to pay the interest to the life beneficiary would entitle the latter to a civil but not a criminal remedy.

MANN, Q.C., *contra*: The Crown had produced evidence to show that the cheques were drawn for a specific purpose, and that, they having been paid to the defendant's own account, the onus was thrown on the prisoner that they were rightly so appropriated.

WAY, C.J., in delivering judgment, said: This is a prosecution under sec. 204 of the Criminal Law Consolidation Act, providing that "where any trustee with intent to defraud, converts or appropriates trust funds to his own use, he shall be guilty of a felony." With respect to the interpretation of this clause we have not the assistance of many cases in the books. I can not charge my memory as to whether there has been a previous prosecution in this colony under the section, and the only case I am able to refer to does not touch the point that has to be decided in this case. At the trial the prisoner was undefended. My impression at the time, so far as I could understand the effect of the evidence, was that there was evidence for the consideration of a jury, but still the case was left so bare on the part of the prosecution that I felt at the time it was very likely I might have overlooked some aspect of the case which ought to be taken into consideration, and, therefore, I thought that the jury's opinion should be taken on the facts, and a case reserved for the opinion of the Full Court, in regard to the law. Accordingly, the case went to the jury, who, with the instructions given them, could hardly return any other verdict than one of guilty. But the argument which has taken place, and the conclusion at which this Court has arrived has satisfied me that it was a very proper case to reserve for the opinion of this Court. Now, the case, as I have said, was laid before the jury in an exceedingly naked and bare manner. If it was the intention to prosecute the prisoner it would have been undoubtedly better for the Crown first to take proceedings for the purpose of obtaining an account from the prisoner as a trustee, instead of attempting to make out a *prima facie* case leaving the debtor to discharge himself if he could. It is possible if that course had been taken that the result of the case would have been different. In the consideration of this case we have to bear in mind that it is not criminal for a trustee to appropriate moneys to his own use. This is done every time a trustee pays money into his own bank and mixes up trust money with his own property, however solvent he may be, and I cannot conceive of the Legislature making such an appropriation of property a criminal offence. The appropriation of property is not a criminal offence. If it were so no prudent man would take the management of the affairs of other people as a trustee, and thus an attempt to punish so severely the trustees would merely react to the prejudice of the *cestui que trust*. There are five cheques, the subject of the prosecution. It is not shown that one penny of the proceeds of these cheques has gone to the prisoner's account. There is no evidence of appropriation, and, therefore, the prisoner is not called upon to answer the case. On these counts he was acquitted. The controversy then, as now, is as to two cheques—one for £120 and the other for £85, drawn by the prisoner in September, 1880, and July, 1881, both of which found their way into his account in the bank, one on the same day, and the other two days after it was drawn. I hold that this was some evidence of appropriation. But is there evidence of an attempt to defraud. It would, undoubtedly, be a breach of trust that the prisoner should use this money for his own benefit, and I think, also, it would be a breach of trust if he borrowed the money. His course would be either to leave it in the bank bearing interest, I say it somewhat doubtfully, but more clearly to invest it on mortgages or on Government securities. But although it would be a breach of trust to borrow the money I do not think it would be a breach of trust that would involve an intent to defraud, and I so directed the jury. His intentions, when he borrowed the money himself, might have been quite as honest as if he lent the money to some other person, and, therefore, although civilly responsible to make good the amount, he would not be criminally liable. But then I directed the jury that the prisoner having said that the money was lent out, and having refused to give any account, and it having been shown that the money went to his credit immediatedly afterwards, it was for the jury to say whether it was appropriated with intent to defraud. Now the evidence is somewhat ambiguous. The prosecutrix is an aged woman, who only speaks German, and is illiterate, and has an unreliable memory in regard to what has taken place. She said that the prisoner told her that the money was "lent out." It appears that the word used meant either "lent out" or "loaned out." I I am not a German scholar, but it appears that she indicated that he meant it was lent to other persons. There is a subsequent part of her evidence to the effect that the prisoner agreed to pay her 6 per cent., and that would mean that she understood that he had borrowed the money himself. That being in evidence, there were two cheques in question. Regarding the cheque of £120 to Mrs. Jane Hunt, which went to his own credit, I am

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clearly of opinion that there was no evidence to go to the jury, but with respect to the cheque for £85, payable to J. Mills, the case is somewhat different and more difficult to decide. Undoubtedly this cheque, on the face of it, represents a loan. Thus, any person reading the cheque, and being acquainted with the fact that there was a will, would come to the conclusion that Bolte, an executor of the estate of Graunitz, had lent a sum of money of £85 to J. Mills out of the trust moneys. Well, then, it was said that this was clearly not a loan, because the cheque was paid to the prisoner's own account two days after, and that the onus of showing that the money was not lent to J. Mills was shifted from the Crown. But in considering that argument the Court is bound to bear in mind that cheques very readily pass from hand to hand, and that between the 16th and 18th days of the month this particular cheque might have found its way back into the prisoner's possession quite honestly. The circumstance that the prisoner himself filled in the paying-in slip would seem to indicate that he was not pressed at that time, or that there was anything to conceal, because it would have been the easiest thing in the world for him to change the cheque over the counter; or to pass it away in the course of his business instead of paying it into the bank under his own signature. And, therefore, it appears to me that the onus still lay upon the Crown of showing that there was no loan to Mr. Mills of the sum of £85 that could have been shown in two ways. If there is a J. Mills resident in the district, they might have called him, and assuming there is no such person evidence could have been given that enquiries had been made as to his whereabouts, and that it could not be discovered that such a person was resident in the district. No attempt of the kind was made, and, therefore, it appears to me that the representation is altogether unshaken. If the prosecution has been in too much haste to institute proceedings, so much the worse for the interests of justice. If the Crown had gone on to negative the facts that there was a loan to J. Mills there would have been a case for the jury to consider. The cheque for £120 may or may not have been a loan to J. Hunt, and, therefore, I desire to add, with respect to that part of the case, that the mere borrowing of the money does not show an intent to defraud. The prisoner's account was overdrawn, but he might have had credit at the bank for a much larger sum than his overdraft amounted to. There is no evidence that he was under pressure from the bank, and, indeed, except that he was unable to pay interest on the trust money when he was called upon to do so, there is no evidence that he was in insolvent circumstances when the prosecution was instituted. I desire to express no opinion whatever as to the prisoner's conduct, but will merely add that no anxiety on the part of the Court to secure the interests of the *cestuique* trust would justify the Court in finding that a criminal law has been broken when the requirements of the statute, so far as the prosecution is concerned, have not been complied with.

BOUCAUT, J. and BUNDEY, J. concurred.

Case answered in defendant's favour.

VICTORIA.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

Feb. 24.

EDDINGTON AND CARISBROOK ESTATE COMPANY, NO LIABILITY v. OCHILTREE.

Rules of Supreme Court 1884—*Order XXX., rule* 1—*A general summons for directions is not applicable to a case where directions are sought as to the place, and manner, and notice of trial in an action ordered on appeal from the County Court, to be reheard before a judge of the Supreme Court under sec.* 120 *of the County Court Statute* 1869—*Practice to be observed where a cause in the County Court is directed on appeal to be reheard before a judge of the Supreme Court.*

Application on behalf of the plaintiff under a general summons for directions, for particulars and directions as to the place, and manner, and notice of trial in an action ordered on appeal from the County Court, to be reheard before a judge of the Supreme Court.

MR. TAYLOR in support of the application.

HIS HONOR said: This was an application by the plaintiff under general summons for directions for particulars and directions as to the place and manner, and notice of trial in an action ordered on appeal from the County Court to be reheard before a judge of the Supreme Court under section 120 of the County Court Statute 1869. A general summons for directions is not applicable in a case of this nature and the summons must be refused with costs, which I fix, by consent, at one guinea. Where a cause in the County Court is directed on appeal to be reheard before a judge of the Supreme Court, the practice proper to be observed in future will be this: The registrar of the County Court, upon being served with a copy of the order of the Full Court, will forward the plaint summons to the prothonotary, who will hold it as the officer of the Supreme Court. The plaintiff, and not the prothonotary, will then set down the cause for rehearing. And the plaintiff, not the prothonotary, will also give notice of trial, which will take place in all cases at Melbourne, unless the Full Court shall have otherwise ordered. I understand it to be the wish of the parties that this cause shall be reheard by a judge without a jury. Sitting in Chambers I cannot depart from the settled practice in cases of this kind, even with the consent of both parties. The matter may be mentioned by either party to the Full Court on notice.

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HASSE v. EICKE. Feb. 25.

Rules of Supreme Court 1884—*Order XIX., rr.* 13, 17—*Appendix D, Sec.* 6, *No.* 1—*Action for slander—Denial of "the several facts and matters complained of" struck out as embarrassing—Each party must, either by a traverse or by an answer in the nature of a plea of confession and avoidance, or by an express withholding of admission, deal with every allegation, material and immaterial, in his adversary's previous pleading, which he does not intend should be admitted by him.—The form given in Appendix D, Sec.* 6, *No.* 1 *is a mere direction, and is not, and does not purport to be a general form of denial to all actions for wrongs.*

Application on behalf of the plaintiff calling upon the defendant to show cause why the statement of defence should not be struck out as embarrassing.

The action was one for slander. The statement of defence was as follows: "The defendant says that he denies the several facts and matters complained of."

MR. FORLONGE, in support: This statement of defence is embarrassing because it offends against the rules of pleading (*Williamson v. L. and N. W. Ry. Co.*, 12 C. D. 787). Order XIX., r. 17, provides that it shall not be sufficient for the defendant, in his statement of defence, to deny generally the grounds alleged by the statement of claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth except damages. Rule 15 of the same order provides that the defendant must raise, by his pleading, all such grounds of defence as if not raised would be likely to take the opposite party by surprise. This statement of defence violates both these rules. Under this defence the defendant may bring evidence as to the publication, the innuendo, the malice, and the truth. The rules were intended to make the parties plead specifically, so that each side would know what it had to meet. If such a general defence be allowed the plaintiff will not know what defence will be raised at the trial, and so would be likely to be taken by surprise. Order XIX., r. 5, provides that the forms in Appendices C, D, and E, when applicable shall be used for all pleadings. No doubt this defence is taken from Appendix D, Sec. 6, No. 1; but if this form is to be taken to be the form of defence to all actions for wrongs, then in some actions, *e.g.*, seduction, there would be two defences as there is a special defence given for an action of that nature.

MR. R. WALSH, to oppose: Order XIX., r. 5, directs that the forms in the appendices shall be followed. This defence is taken from Appendix D, Sec. 6, No. 1, and is, therefore, sufficient. If your Honor thinks that this form is not a sufficient defence the defendant will put in a more special defence. As the defendant has followed the form he should not have to pay the costs of this application.

HIS HONOR said: This was an action for slander. The statement of claim alleged that the plaintiff had suffered damages by the defendant having falsely and maliciously spoken of the plaintiff certain defamatory words specified. The defence is in these terms—"The defendant says that he denies the several facts and matters complained of." I think that this defence is embarrassing, and must be struck out or amended. It is manifestly at variance with the express terms of rule 17 of Order XIX., which directs that "each party must deal specifically with such allegation, of fact of which he does not admit the truth, except damages." This rule, taken in conjunction with rule 13 of the same order, requires that each party shall, either by a traverse or by an answer in the nature of a plea of confession and avoidance, or by an express withholding of admission, deal with every allegation, material and immaterial, in his adversary's previous pleading, which he does not intend should be taken to be admitted by him. The only exception to this rule appears to be the case of a defence on other than equitable grounds by a tenant in possession in an action for the recovery of land. Order XXI., rule 21.—Publication of the alleged slander—publication with reference to the plaintiff—the meaning of the words uttered—their falsity—and malice in the utterer, are all allegations of fact in this statement of claim, which, if not denied, will be admitted. But this rule of pleading does not alter the rule of evidence, which determines upon which of the parties the burden of proving particular allegations is to rest. Though the plaintiff has to aver that the alleged slander is false he need not prove that it is false. The defendant must prove it to be true, and he may do so, I think, under a plea denying that it is false. So, if the defendant denies malice, the plaintiff has not to prove that the alleged slander was uttered maliciously, that will be implied. But the defendant must, under such a traverse, prove that the alleged slander was uttered on a privileged occasion, which is the only mode in which implied malice can be rebutted. It was urged by Mr. Walsh that this plea, in its present form, was justified by Form No. 1, Sec. 6, of Appendix D; but I think this argument was successfully met by Mr. Forlonge, who pointed out that No. 1 is, in fact, a direction, and that it is not, and does not purport to be, a general form of denial. Like rule 17 of Order XIX., it really enjoins a defendant in all action of wrongs to deny specifically each allegation of fact, the truth of which he does not intend to admit. But this plea does not do this. Order made as applied for. Costs to the plaintiff, which, if the parties consent, I fix at three guineas. I certify for counsel.

Solicitors: For plaintiff, *Kidston;* for defendant, *Gaunson.*

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Re DUFFETT AND MANTON. Feb. 27.

Common Law Procedure Statute 1865 (*No.* 274), *Sec.* 388—*Attorney and client—Taxation of costs —Retention of the amount of a bill of costs by a solicitor out of moneys of the client is not necessarily payment of the bill by the client—If the client appear to have been under pressure to assent to the detention of the amount, and has not had an opportunity of examining the bill he is not to be regarded as having paid the bill so as to preclude the taxation of it, but if the client knows and consents to retention by the solicitor, such retention may amount to payment.*

Application under sec. 388 of the Common Law Procedure Statute for the taxation of two bills of costs.

MR. OGIER, in support of the application: Messrs. Duffett and Manton acted as attorneys for one M'Gill in two suits—*M'Gill v. Fisken and Others*, commenced in October, 1881, and concluded in February, 1883; and *M'Gill v. Baird and Others*, commenced in March, 1881, and concluded in July 1884. These suits were practically the same in parties and matter. The question is whether the two cases are to be brought within the same category. I submit they can. In the suit of *M'Gill v. Fisken* the attorneys delivered a signed bill of costs to the applicant, retaining certain moneys of his, and lodging the balance to his credit, at the same time forwarding him the bank deposit receipt. This retention of money cannot be regarded as payment. As these two suits were running together, this retention of moneys, if it is to be regarded as payment, must be taken to be a payment on account of the costs of both suits, and not as payment of the costs in *M'Gill v. Fisken.*

MR. HODGES, to oppose: Payment has been made in the suit of *M'Gill v. Fisken.* Accounts were rendered, and the bank slip for the balance of the moneys was accepted by the complainant. This transaction took place more than twelve months ago, and consequently special circumstances must be shown to warrant the Court in ordering taxation. In this case these circumstances are wanting. The law on this point was settled in *Re Hardy and Madden*, 7 V. L. R. (L.) 266; *Re Chambers*, 6 A. L. T. 125; and *Re Sutton and Elliott*, 11 Q. B. D. 377.

HIS HONOR said: This was an application to refer two bills of costs to taxation. The order may go with regard to the bill of costs in the suit of *M'Gill v. Baird and Others.* The application, so far as it relates to the bill of costs in the suit of *M'Gill v. Fisken* cannot be granted. A signed bill of costs in this latter suit was delivered to the client so far back as 9th April, 1883, the solicitors then retaining the amount of the bill out of moneys of the client, lodged by them in the bank. The business done in this suit is not shown to have been necessarily connected with or to have formed a part of the business done by the solicitors in the other suit, and the client, although he now says that he did not consent to the retention by the solicitors of their charges, does not appear to have made any objection at the time. Retention of the amount of a bill of costs by a solicitor out of moneys of the client is not necessarily payment of the bill by the client. If the client appear to have been under pressure to assent to the detention of the amount, and has not had an opportunity of examining the bill, he is not to be regarded as having paid the bill so as to preclude the taxation of it. But if the amount of the bill be retained by the solicitor with the knowledge and consent of the client, who has the means of examining the charges contained in the bill, such retention may amount to payment. The settlement of this bill of costs in April, 1883, amounted, I think, to payment, not under pressure, and, as this payment was made more than twelve months before the present application, the bill cannot now be taxed (see *Re Hardy v. Madden*, 7 V. L. R. (L.), p. 266; *Re Sutton*, 11 Q. B. D., p. 377). I acted on these authorities in *Re Chalmers*, 6 A. L. T., p. 125.

Solicitor for applicant, *Duerdin.*

PRACTICE COURT.

(Before His Honor Mr. Justice Williams.)

March 7.

LOCAL BOARD OF HEALTH OF BALLARAT (APPELLANTS) v. CARVALHO (RESPONDENT).

Justice of the Peace Statute 1865 (*No.* 267), *Sec.* 150—*Appeal case—The onus of proving that the appeal case was served after it was filed with the Prothonotary lies on the party moving to strike the appeal case out of the list—Appeal case not struck out where the appellants have been guilty of no undue delay, although the case was not filed within fourteen days from receiving the same from the Justices.*

Application on behalf of the respondent to strike an appeal out of the list.

MR. GOLDSMITH, in support: An appeal was granted in this case from a decision of justices dismissing the case on the ground that they had no jurisdiction. The appeal case has been set down in the present list. The grounds of this application are: (1) That the appellants did not, within 14 days, transmit the case to the Full Court as required by section 150 of Act No. 267. (2) That the appellants did not, before transmitting the case to the Court, give notice in writing of the appeal, together with a copy of the case to the respondent under the same section. The case was received by the solicitors of the respondent on the 11th November, 1884, it was not filed with the Prothonotary until the 2nd December, 1884, the reason given being that it was not filed so as to enable the appellants to get the signatures of the other justices to the case, Mr. Carr, the police magistrate, then being the only

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signatory. The signature of one justice is sufficient, and, therefore, this case on the 11th November was a fit case to be set down for appeal at that time. The appellants are out of time for not having set the case down within the fourteen days. There is nothing to show that the appellants gave notice as required to the respondent before filing the case with the Prothonotary, the case being filed with him on the same day that notice was given to the respondent, viz., on the 2nd December.

MR. BOX, to oppose: It is constantly the case that the signatures of other justices are required by appellants; in fact, it is reasonable to imagine that versions of a case might disagree. The appellants received the case as stated back on the 27th November, if that is the date we are in time. There is nothing on the face of this case to show whether the respondent or the Prothonotary received it first. The onus of showing this lies on the respondent. The Court will not divide a day to give effect to a technical objection.

HIS HONOR said: As to the first objection the onus lies on the party making the motion to show that the appeal case was served after it was filed with the Prothonotary, this has not been done, and there is nothing to show that one was done before the other. I may presume that the case was served on the respondent before it was filed with the Prothonotary. As to the other point, whether it was filed within fourteen days, I have considerable doubt. I think appellants have the right to submit a case for the signature of the other justices and the justices have the right to sign the same, but they must do this promptly. Owing to circumstances this case was delayed through no fault of the appellants. They have been guilty of no undue delay. I refuse the application

Solicitors: For respondent, *Watson*; for appellant, *Cuthbert* and *Wynne*.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Williams.)

LEWIS V. KLAPPROTH. Feb. 25.

Infringement of trade mark—"Borax"—Old and new law—Trade Marks Statute 1864 (*No.* 221), *Sec.* 2. *—Trade Marks Registration Act* 1876 (*No.* 539) *—The word "Borax" cannot be registered as a trade mark under Act* (*No.* 539)*—It cannot be appropriated as a trade mark under old law.*

The defence that a word is incapable of appropriation as a trade mark either under the old law or under the new, is a good one to an action for infringement.

Action brought by Lewis and Whitty, of Melbourne, against F. Klapproth, of Sandhurst, to restrain the defendant using the word "Borax" as applied to soap made by him, on the ground that it was an infringement of their trade mark. The plaintiffs had two trade marks, one with the words "Borax Soap" impressed upon the bars of soap made by them, the other with the word "Borax" with a border round it, printed upon packages containing soap, extract of soap, etc. Plaintiffs alleged that they were registered for the first trade mark in November, 1883, and for the other in April, 1884, and they claimed that the word "Borax," as used by them, although their soap, to which it was applied, contained borax as one of its ingredients, was not intended to be descriptive of the kind of soap, but was an arbitrary or fanciful name, and that they had adopted it as their trade mark or trade name. The defendant, on the other hand, alleged that for many years past he had used borax as an ingredient in the manufacture of his soap, although he did not sell it as a borax soap until after the plaintiffs had sold theirs under that name. The plaintiffs asserted that there was such a similarity in the shapes of the bars of the defendant's soap and theirs, and in the printed matter, as to deceive an ordinary purchaser; but the defendant denied this, and contended he had as much right to use the word "Borax" as the plaintiffs had.

MR. WEBB, Q.C., and MR. BRYANT for plaintiffs; MR. GOLDSMITH and MR. HIGGINS for defendant.

HIS HONOR said: This was an action brought by the plaintiffs to restrain the defendant from infringing certain trade marks of the plaintiffs' by marking the wrappers, in which defendant enclosed his soap, with the word "Borax." The action was tried on affidavits, which in this case are both numerous and voluminous; but having regard to the view which I take of the case, the greater part of the matter contained in the affidavits becomes comparatively immaterial. The case has been very well and carefully got up, and has been argued with striking ability on both sides. There are points of some difficulty involved in it necessitating reference to an examination of a very long series of authorities. The plaintiffs in argument based their right to this so-called trade mark as their property—first by virtue of registration under the Trade Marks Registration Act 1876 40 Vict. No. 539; secondly, under the old law; contending further that the word "Borax" came within the interpretation of the word "mark" in sec. 2 of the Trade Marks Statute 1864, No. 221. It was upon these two points chiefly that counsel for the defence addressed me, contending that neither under the Acts 539 or 221 or under the old law was the word "Borax" capable of appropriation as a trade mark. But counsel for the plaintiffs, in reply, put forward a new and additional contention (a course against which counsel for the defendant protested on the ground that it was not put forward by the statement of claim), to the effect that even if plaintiffs had not a right to the use of the word "Borax" as a trade mark, yet that, being the first to apply this title to their soap, they could maintain their present claim for an injunction, inasmuch as the defendant was using the word in such a manner as to induce the public to believe that the soap he was selling was the plaintiffs. I have not had any argument beyond the protest I have mentioned

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addressed to me upon this point by counsel for the defendant, no doubt on account of the late stage of the proceedings at which it was put forward, and no application has been made to me on behalf of the plaintiffs to amend the statement of claim. I shall first consider and deal with the two points on which the case was chiefly argued, and then with the point urged in the reply, stating very briefly such of the facts as may be material to the consideration of the case as submitted to me. The plaintiffs and the defendant are both manufacturers of soap, the former in Melbourne the latter in Sandhurst. Borax which is, and which I find to be, a well-known word in use in the English language (see *Johnson's* and the *Imperial Dictionaries)* is one of the principal ingredients in the soap manufactured by plaintiffs and defendant respectively, the reason for its use as one of the principal ingredients of the soap being its great cleansing power. The defendant had been using borax as an ingredient in the soaps manufactured by him for several years, and in 1883 was selling a dry soap manufactured by him in wrappers labelled "Borax Dry Soap," apparently before or about the time that the plaintiffs applied the term "Borax" to their hard soap. No complaint is made by the plaintiffs against the defendant in respect of his vending or labelling of the "Borax Dry Soap," their complaint against the defendant is confined to his vending his hard soap in wrappers with the word "borax" imprinted thereon. On the affidavits I have come to the conclusion that before or at the time plaintiffs endeavoured to appropriate the term "Borax" to their hard soap, and commenced to vend it under that designation, defendant was selling his dry soap under the designation of, and in packets or labels containing the designation "Borax Dry Soap," but I have also come to the conclusion that plaintiffs were the first persons in this colony to apply the term "Borax" to hard soap manufactured in this colony. They so first used the term for the purpose of vending their hard soap in November, 1883, the writ in this action being issued on the 4th September, 1884. I also find that the term "Borax" was applied by the plaintiffs to their hard soap for the purpose of designating that it contained "borax," and that it consequently possessed great cleansing qualities. In fact, plaintiffs almost admit this (see paragraphs 4 and 5 of plaintiff Whitty's affidavit). In other words, I find it was used by the plaintiffs as a term of description. I also find that the printed wrappers for his hard soap, used by defendant, were such as to be calculated to deceive incautious purchasers not having the opportunity of seeing plaintiffs' and defendant's wrappers in juxtaposition, and that by means of these wrappers such purchasers might purchase defendant's hard soap, believing it to be plaintiffs' hard soap; and I also find, that as applied to hard soap, the term "Borax" has not become *publici juris*. On these findings and conclusions, defendant's defence, apart from the third position taken up by the plaintiffs in reply, is limited to the points that neither under the old law or under the new is the word "Borax" capable of being appropriated as a trade mark. This ground of defence can, it appears, be taken to an action for infringement, and is not merely ground for applying to have the register rectified *(Re Palmer's Application*, 21 C. D., p. 59, *per* Jessel, M.R.). Is it, then, in the present instance a good defence? In the first place, I think it is clear that the word "Borax" could not be registered as a trade mark under the Act No. 539—it does not come within any of the definitions given in section 2. This is, I think, perfectly clear from the terms of the section itself, but the case of *re Palmer's Trade Mark* on appeal in 24 C. D., p. 504, and which was decided after the passing of the analogous English act, 38 and 39 Vict., C. 91, is conclusive upon the point. Then could the word "Borax" be appropriated as a trade mark under the old law? I think, having regard to my finding, that it is, and has been, used by the plaintiffs as a mere term of description of the article sold for the purpose of designating that it contains borax, and consequently possesses peculiar cleansing qualities, that it could not be so appropriated. The authorities upon this point are not only numerous, but happily tolerably conclusive. To hold that a word of this class could be so appropriated would be "an extravagant extension of the right to a trade mark." It will be sufficient, however, to refer to the following as authorities for the conclusion I have arrived at upon the point:—*Young v. Macrea*, 9 Jur. N. S., p. 322—the Paraffine Oil Case; *Kelly v. Byles*, 13 C. D., p. 682—*Post-office Directory*; *Chevin v. Walker*, 5 C. D., p. 850; *re Palmers trade mark*, on appeal, in 24 C. D., 504—Braided Fixed Stars; *Linoleum Manufacturing Company v. Nairn*, 7 C. D., p. 834; *Wolfe v. Hart*, 4 V. L. R. (E.), p. 132; *re Leonard and Ellis's trade mark*, 26 C. D., p. 288. I do not think, therefore, that the plaintiffs are entitled to claim this injunction on the ground that they are entitled to the use of this word "borax" as their trade mark under either the old law or the new law, for under neither, as it appears to me upon the authorities, is the word "borax" capable of being appropriated by them as a trade mark in respect of the soap vended by them. But it was then finally, and at a very late period of the case, contended by the plaintiffs that, conceding they had no such right, yet that having been the first to use the word as descriptive of their hard soap for the purpose of selling it, and having sold it under that description, they were entitled to have the defendant restrained from using wrappers (for his hard soap) on which the word "borax" was imprinted in such a manner as to induce the public to believe that the hard soap he was selling was the plaintiffs' hard soap. As to this point I have in the first place very great doubt, notwithstanding

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the case of *M'Andrew v. Bassett*, 33 L. J. C., p. 561, to which I have been referred, whether the plaintiffs' user of the word has been of such a nature, either in point of time or of extent, as to entitle them to claim an injunction on this ground; but, apart from this, I do not think that in the pleadings the claim for an injunction is based upon this ground. In the statement of claim, plaintiffs put their case wholly and solely, it appears to me, on their right to the word "borax" as a trade mark (see paragraphs 3 and 4), and their cause of action is for infringement of that trade mark. No complaint is made in the statement of claim of any wrong done by defendant to plaintiffs, irrespective of an infringement of trade marks, and the claim is evidently based on the assumption that the words registered as trade marks were either capable of being registered as trade marks under the Act 539 or of being appropriated as trade marks under the old law. The plaintiffs' claim, therefore, fails, and I order judgment to be entered for the defendant, but, under the circumstances of the case, without costs.

(Before His Honor Mr. Justice Molesworth.)

PRUNTY V. ANTHONESS. Feb. 26.

Assignment by way of mortgage—Concurrent bill of sale—Omission to renew contract for sale—Contract for letting and hiring—Security—Redemption.

This was a suit by Edward Prunty against George Anthoness, claiming to be entitled to redeem a mortgage over the furniture, lease, &c., of the Imperial Hotel, Carlton. The defendant asserted that the transactions between him and the plaintiff were in the nature of a sale of the property by the plaintiff to him. The plaintiff, on the other hand, alleged that the defendant merely took the property as security for a debt.

MR. DUFFY for the plaintiff; MR. HOOD for the defendant.

HIS HONOR, in giving judgment, said: The plaintiff, Mr. Prunty, holding the Imperial Hotel. Carlton, by indenture August 30, 1882, as in consideration of £117 4s. for goods, hotel furniture, &c., and £500 paid as an ingoing, obtained an assignment of the goods and a lease of the hotel for seven years at a rent of £130 a year. This money, or the greater part of it, was advanced by the defendant, Mr. Anthoness, to the plaintiff, and to secure the repayment by indenture, September 5, 1882, the plaintiff, as in consideration of £500 paid by the defendant, assigned to the defendant his interest in the hotel absolutely. This was perfectly understood to be intended as a mortgage for securing the plaintiff's actual debt to the defendant, about £600, with interest at 8 per cent., and it was agreed that the plaintiff occupying the hotel should pay off that debt by weekly payments of £2 a week, or as much more as he could, and also £12 a quarter for interest, which payments for some time he regularly made. There was a bill of sale of same date, plaintiff to defendant, reciting a loan of £600 and an intent to secure it and further advances, with interest, and assigning to the defendant the same hotel furniture as in schedule, and such furniture, &c., to be afterwards brought to the hotel, and the estate and interest of the plaintiff in the lease, and also the goodwill of the business and publican's licence, with a provision for redemption and provision in case of default by the plaintiff, for the defendant to take possession and sell, pay himself, and pay overplus to the plaintiff. The plaintiff carried on the business of the hotel, and the defendant made various other advances to, and incurred liabilities for, the plaintiff. The defendant omitted to renew the conditional bill of sale, and requested the plaintiff to substitute another for it, as a protection for security, and the defendant directed Mr. Demaine, his solicitor, to prepare another document, and Demaine prepared documents in the form of a contract for sale and contract for letting and hiring, dated February 8, 1884, by which plaintiff purported in consideration of £600 due and owing by him to the defendant, and in satisfaction of the said debt, to sell to defendant the goods and chattels in a schedule to it, namely, the stock-in-trade of the hotel, the furniture, etc., as in document September 5, 1882, with a contract of letting at £5 a month. The plaintiff and defendant executed this document at Demaine's office, the plaintiff having never seen it before. Demaine spoke with the plaintiff, and the signatures were in the presence of Mr. Cuthbert, his clerk. Plaintiff's case is that he intended a mere renewal of the former security; defendant's, that the plaintiff intended to sell as for £600, part of a somewhat larger debt which he owed. There is no pretence for saying, as between the plaintiff and defendant, that there was a word said of any sale. There was no adjustment of accounts, no valuation of property to be sold. The plaintiff went to Demaine's intending merely to renew the old security. He says he never read the document. Demaine does not say he did. If read it would explain its meaning—I think a sale for £600, part of plaintiff's debt to defendant, not in consideration of a discharge of the debt. But Demaine substituted for reading by or to the plaintiff his explanation, which I think plaintiff understood to mean that the document was wanted as a protection against his creditors, but not at all that as between him and defendant it was more than substituting one security for another. The defendant does not say more was said. Cuthbert did not profess to explain it to him, but understood plaintiff to say that he was satisfied with an arrangement for absolute sale for the money he owed the defendant. The document was no discharge for the money he owed the defendant, but only for £600, and would have left him liable for a balance and the defendant makes a counter-claim, including

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a balance. The defendant went on for two weeks after the execution of the document, February 8, 1884, receiving the £2 a week instalments as before. I am somewhat embarassed in understanding and dealing with subsequent matters between the parties. A meeting of plaintiff's creditors had been called for some time about 15th February, 1884, at the office of Mr. Leonard, plaintiff's solicitor. The only persons at it were plaintiff, and Leonard, and Mr. Demaine. I do not think anything was done proper for such a meeting. Something was said as to keeping plaintiff's creditors off. An arrangement I think outside of the document February 8, and very much intended as a protection from plaintiffs other creditors, was made that plaintiff should give up possession, and a Mr. Wade get into session of and carry on the business; the plaintiffs say as a nominee of the defendant until he could sell the entire property, when defendant was to account for the proceeds and pay the plaintiff so much as should be over his debt. As to Wade's management which lasted about seven months, until a sale for about £750, which defendant effected, plaintiff says he understood he was to get the takings by Wade, all outgoings for Wade, rent, taxes, expenses being paid by the defendant and deducted from the takings, not saying that the plaintiff was to be otherwise liable for them. I think there was throughout an understanding that the defendant was to sell and give plaintiff credit as against his debt for the proceeds of the sale, and pay him any overplus. As to how it should be during Wade's management I think they had no distinct understanding as to their rights and liabilities. I think I should deal between them as if defendant had taken possession under the documents, September 5, 1882, with liability to account for takings and disbursements, as varying plaintiff's debt to defendant, Wade being regarded as their common agent, the accounts not referring to liability for wilful default. Plaintiff says that after the sale he applied to the defendant for accounts, and defendant told him he had lost £200 and there was no necessity for accounts. Defendant says plaintiff never made any claim for an account, but asked him if there was any surplus of the sale of the hotel to give it to him, and that he, (defendant) said that the estate owed him over £200. I think that there was an unsettled account between the plaintiff and defendant, which I should direct to be taken. Declare that document signed by the plaintiff, Edward Prunty, and the defendant George Anthoness, on the 8th day of February, 1884, should not operate as a sale of any part of the property therein mentioned, but that the relation between the parties as mortgagor and mortgagee continued as debtor and secured creditor, and that defendant should be treated as having taken possession, as he might have done under the documents of September 5, 1882, and as having sold the mortgaged property under the powers in them. Refer to the chief clerk to take an account between the parties, and certify the debt due between them, giving the defendant credit for the original debt and all subsequent advances, with interest at the rate of £8 per cent. per annum, and during the management of the hotel business by Wade for wages paid or allowed to Wade, and all rent, rates, trade expenses, and outgoings made or paid by Wade or defendant, or for which the defendant became responsible, and giving the plaintiff credit for all payments made by him to defendant on the mortgage accounts, and for all sums received by the defendant or Wade as trade receipts during the carrying on of the said business by Wade therein until the sale effected by the defendant, and for all sums received by the said defendant for the sale of the lease of the said hotel and the license and goodwill thereof, and of the furniture and stock-in-trade thereof, the said chief clerk certifying the consideration of the said sale received or to be received by the said defendant, and all just charges and expenses incurred in the said sale. Reserve further directions and costs. Liberty to apply.

Re KELLACKY. March 12.

Assignment of bond entered into by administrator—An improper payment of simple contract debts before judgment debts or a delay in payment of debts constitutes a breach of the administration bond, and a creditor would be entitled to sue upon such bond—Where a creditor has assigned his right he cannot sue.

This was a motion on behalf of Mr. A. Thunder, a creditor of one Winifred Kellacky, late of Sandhurst, that the administration bond entered into by the administratrix of the estate should be assigned to Mr. Thunder with the view of its being enforced against the administratrix and her sureties. It was alleged that the administratrix had not paid a debt due to Thunder, although he had recovered a judgment for it, but had paid other simple contract debts in preference, and there was now not sufficient assets left to satisfy the judgment. The application was opposed on the ground that Thunder had already assigned this with other property to a trustee, and had, therefore, no further interest in the judgment.

MR. ISAACS appeared in support of the application; MR. HIGGINS for one of the sureties; MR. TOPP for the adminstratrix and another surety.

HIS HONOR said this was an uncommon application, and, irrespective of the objection to this particular applicant, there would be a great deal of difficulty as to the right of anybody to sue on the administration bond. He thought a delay in payment of debts, or an improper payment of simple contract debts, before judgment debts, would constitute a breach of the bond, and that the breach would entitle a creditor to come forward and sue upon it. As to the discretion of the Court in the matter he had considerable difficulty. In this case, he thought the applicant had deprived himself of

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the right to put the bond in suit, as he had assigned his property to creditors. He was not the person substantially injured by the non-payment of the debt. The application would, therefore, be refused with costs, as regarded the surety Williamson, but without costs as regarded the administratrix and her husband, who was the other surety.

SUMNER v. BENN. March 12.

Specific performance of agreement to purchase land —Will—Construction.

This was a suit in which Mrs. Sumner, the widow of the late Mr. T. J. Sumner, sought to enforce against Mr. John Benn specific performance of an agreement by the latter to purchase some property in Willis-street, Richmond. The agreement for the sale of the land was made between the plaintiff and the defendant in September, 1884. The question involved in the suit was whether Mrs. Sumner had the legal estate in the property, so as to be able to dispose of it, or whether she had merely a life interest in it. This property, with others, was the subject of a will of her father, Mr. J. J. Peers, who died in 1850. By his will, Mr. Peers left his property to trustees, and after providing for certain payments to his wife, he directed that the trustees should hold the property in trust for his daughter (the plaintiff), who afterwards married Mr. T. J. Sumner. The will made provision for the distribution of the property in the event of the plaintiff marrying and having no children, and for her husband surviving her, or for the event of her husband and children surviving her. But no provision was made as to what should become of the property if she had children, and if she survived her husband. Her husband died a few months ago, and it was contended for her that, under her father's will, she was absolutely entitled to the property, and could dispose of it as she pleased, while it was submitted for the defendant that she had only a life interest in it, and that after her death the land went to her children.

MR. A'BECKETT for the plaintiff; MR. HIGGINS for the defendant.

HIS HONOR, in giving judgment, said: The question I have to deal with in this case turns on the construction of the will of John Jones Peers, formerly of Richmond. He first directed payment of his debts; then he devised to trustees, Messrs. Thorpe and Grice, all his lands and real estate and personal estate upon trust, with all convenient speed to sell his freehold estate, except certain land in Collins-street and land in Richmond on which he resided, and to hold the proceeds of the sale and his personal estate to invest at interest, and as to the investment to pay certain annuities and legacies, then to keep down the interest of mortgages affecting the properties excepted from sale until the principal sum due was paid, and then left the trust moneys and income of them for his daughter, Sarah Peers, for her separate use, free from any husband she might thereafter marry. He then directed that if his daughter should at any future time take a husband, and depart this life during the lifetime of such husband without leaving any issue her surviving, the trustees should pay to such husband who should survive his daughter the whole of the annual interest during his life, but should his daughter, having taken such husband, depart this life leaving children, and also such husband her surviving, the trustees should be possessed of the trust moneys and interest thereof, and that they should sell and convert into money such residue of his real estate as he had therebefore directed to be reserved from sale in the first instance, and should be possessed of the money to be derived from the sale thereof upon trust to distribute all the trust moneys into equal shares amongst and between such future husband and such children as she might have her surviving *per capita*, paying the husband his share, with arrangements somewhat complicated as to the children's shares. There was then a provision that if his daughter should die unmarried, or should she survive any husband she might marry, and die without leaving a husband or issue her surviving, or should she leave a husband her surviving but without any issue, or should she leave issue who should die under age and unmarried, with similar complications; then, after the decease of the said husband and sons, &c., surviving, if his wife should be surviving, or if his daughters should die before him, then he left the income to his wife for life, and after her decease he directed his trustees to hold the trust property and to sell and convert into money, if such have not been previously done, such residue of his real estate as he had theretofore reserved from sale in the first instance, and to hold the same upon some very complicated trusts for a Wesleyan Methodist purpose. The facts which occurred were, that the daughter married and her husband died, leaving issue by her. She was her father's sole heiress, and the statement in an action by her is that she, being a widow with children, contracted to sell part of the reserved land to the defendant, Mr. Benn, who refuses to complete the purchase, on the ground that the beneficial interest of the plaintiff is only for her life, inasmuch as the land agreed to be sold is devised by the said will, after her death to her children. I have been referred to, and looked at, *Kinsella v. Coffey*, 11 Irish Chancery Cases 154; *Crofter v. Daly*, L. R. 4 C.P. 159; Jarman on Wills, 546-567. There is some difficulty in putting a distinct meaning on all the words of the will. The legal estate is clearly in the trustees but the daughter, as heiress, would take all undisposed of. There is no distinct provision giving her and her children anything in the land reserved, except through the trusts after sale, but there are signs of an intention outside of express words that the testator's whole estate should go to her husband and children, and the ultimate charity, failing them, and Courts lean much against intestacy total or

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partial in the construction of wills. The original trust for sale excluded the reserve lands. The next trust for sale directly is in the event of her dying in the lifetime of her husband without having any issue her surviving, which is become impossible as to her first husband; but it is possible that she may take another husband, and leave a child or children and him surviving. The words of the will are not confined to a first husband, and were not, I think, intended to even if they were. Among subsequent provisions there is one that, should she survive her husband, and die without leaving issue her surviving, or a husband, &c., then the trustees, after the decease of his wife, should sell the reserved lands if not previously sold. This state of facts is probable. There may be difficulty in finding cases where the trustees may sell either under this or former power, and to determine rights as between issues of several marriages, and saying if children should take by implication, but I think a trust for sale may arise, and therefore that the plaintiff cannot make title, I dismiss the action. Nothing has been said of costs, and therefore I say nothing of them.

March 19.

Re SNOWBALL; *Re* TREGASKIS.

Act 7 Vic., No. 19, Sec. 13—Appointment of assignees —Discretion — Further particulars — Although the Act 7 Vic., No. 19, allows the appointment of new assignees the Court has a discretion— Affidavit of applicant's solicitor necessary as to whether the insolvent wanted his certificate, and what he wanted it for, whether there were any creditors, whether they had been served with notice of application, and whether any creditors had proved their debts.

Application in the estate of Wm. Snowball, and in the estate of Richard Tregaskis for orders for the appointment of assignees in each estate, in the one case in the place of Mr. Goodman, who had died, and in the other case in place of an assignee who had resigned. The application was made under the Act 7 Vict., No. 19, sec. 13.

MR. FINK in support.

HIS HONOR said that in the case of Snowball the application was made on an affidavit made by the managing clerk of the town agent of the country solicitor. He stated that the applicant had become insolvent in 1860. He now desired his certificate. The reason was not stated. Probably it was because he desired to give title to some property. Nothing was said as to the motive for requiring it, nor whether there were any creditors. The Act said that it should be lawful to appoint a new assignee. He thought the Court had a discretion whether that should or should not be done. He required further particulars as to whether the insolvent wanted the certificate, and what he wanted it for; whether there were any creditors, and whether they had been served with notice of the application, and whether any creditors had proved their debts. All these statements must be stated in the affidavit of the applicant's solicitor. Besides these matters it did not appear that any notice had been given to the gentleman who resigned the assigneeship or the gentleman whom it was proposed to appoint in his place. In the case of Tregaskis it was stated that the certificate of discharge was required to give title to property, but he required more detailed information than had already been supplied.

(Before His Honor Mr. Justice Williams.)

DAVIES V. HERBERT. March 16.

Stamp Duties Act 1879 (*No.* 645), *Sec.* 51—*A mortgage over land to secure the payment of money is not a promissory note within the meaning of Sec.* 51 *of Act No.* 645—*An act imposing duties is to receive a strict and not a liberal interpretation so far as the imposition of the duty is concerned—A document containing promises to pay is to be regarded as a promissory note under Sec.* 51 *of Act No.* 645, *only* (1) *where the promise to pay is a promise to pay a fixed and definite sum of money;* (2) *where the primary purpose of the document containing the promise is the promise to pay such sum—The primary object of a mortgage is the conveyance of land to secure the repayment of a sum of money, and it does not promise to pay a fixed or definite sum of money, but merely to pay so much "as shall for the time being remain unpaid."*

The plaintiff, Mr. R. B. Davies, of Melbourne, brought an action against the defendant, John Herbert, a farmer, to recover possession of some land at Shepparton. The land had been mortgaged by Herbert to a person named Warnock, who, under the powers contained in the mortgage, sold to Davies. The latter applied for a certificate of title to be issued to him from the office of the Registrar of Titles. Herbert lodged a *caveat* against the issue of the certificate of title to Davies, but the Registrar was of opinion that he had no right to lodge a *caveat*, and therefore granted a certificate of title to Davies, who afterwards sought to eject Herbert from the land. Herbert then made the Registrar-General a party to the action, contending that he had no right to issue the certificate of title in defiance of the *caveat* that had been lodged, and claiming that if Davies was declared entitled to the land, he (Herbert) should be repaid the value of the land by the Registrar-General. It was also contended on behalf of Herbert that the original mortgage was invalid, as it had been insufficiently stamped; and that, as it contained a promise to pay the debt, it should have been stamped as a promissory-note.

MR. HODGES for the plaintiff; MR. ISAACS for the defendant, Herbert; MR. BOX and MR. BUNNY for the Registrar of Titles.

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The action was heard on the 25th February, and judgment was now given.

MR. JUSTICE WILLIAMS said: This was an action of ejectment to recover possession of certain land. The plaintiff's title is a certificate under the act. The identity of the land, notice to quit, and demand to possession, were all admitted. Apart from other considerations, therefore, the plaintiff is entitled to recover the land which he now claims. The defendant, however, admitting this, counter-claims both against the plaintiff Davies, and also against Gibbs, as registrar of titles. By these counter-claims defendant seeks to have set aside or cancelled and declared of no effect and void as against him, the defendant, the mortgage of the land from defendant to one Warnock, and the subsequent transfer from Warnock to plaintiff, and also the certificate of title for the land issued to plaintiff on such mortgage and transfer, and as against the Registrar of Titles, that he be directed to call in and cancel the certificate. The counter-claim also makes claims for damages against the plaintiff and against the registrar under sections 144 and 146 of the Transfer of Land Statute in respect of the issuing of the certificate of title to the plaintiff. A number of points have been put forward in argument in this case in support of the counter-claim; but having regard to the conclusion at which I have arrived upon two questions of fact, and also to the view I take upon the point of law, as to the validity of the mortgage, it is unnecessary for me to consider any of the other points in the case. For if the mortgage be valid, if there was default under that mortgage, and if plaintiff was a *bonâ-fide* transferee for value, the counter-claims as against both plaintiff and the registrar fail, and judgment must be entered for the plaintiff absolutely. I have no hesitation in finding that there was default under the mortgage, and also that plaintiff was a *bonâ-fide* transferee for value; the only point remaining, therefore, for my consideration is whether the mortgage which the defendant executed and gave to Warnock is valid or otherwise. There is only one respect in which it is said to be invalid, and that is that it has not been duly stamped under the Stamp Duties Act 1879. In other words, it is said that a mortgage of land given to secure the payment of money is a promissory note within the meaning of section 51 of the Stamp Duties Act, and must be stamped as such, and if not so stamped is invalid. It is a grave question whether the defendant is not by his laches, acts, and conduct, stopped from taking this objection—whether, in fact, he can now be heard to raise this objection. However, assuming against my own impression that he is not so estopped, and that I can receive the mortgage in evidence, as I think I can, even when tendered by the objector (see *Enthoven v. Hoyle*, 13 C. B., p. 373), for the purpose of considering the objection, I have come to the conclusion that the objection should be overruled, on the ground that a mortgage over land to secure the payment of money is not a promissory-note within the meaning of section 51 of the Stamp Duties Act. Whether it is or is not depends upon the proper interpretation to be given to the term "promissory-note" in section 51 of the Act. The Act is one imposing duties, and as such is to receive a strict and not a liberal interpretation so far as the imposition of the duty is concerned. This principle is well put by Lord Cairns in *Partington v. the Attorney-General*, 4 E. & T. App., p. 122:—"If the person sought to be taxed comes within the letter of the law, he must be taxed. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." And the same principle of construction was followed in the case of *Cox v. Rabbits*, 4 App. Cas. 473. Now, applying this principle to the act under consideration, it seems to me that section 51 declares only those documents containing promises to pay to be promissory notes—(1) when the promise to pay is a promise to pay a fixed and definite sum of money; (2) when the primary purpose of the document containing the promise is the promise to pay such sum. Now, even if this covenant to pay (see section 61 of the Transfer of Land Statute) be a promise, it is not a promise to pay a fixed or definite sum of money, but merely to pay so much "as shall for the time being remain unpaid." To ascertain this a lengthy taking of accounts might be necessary. Nor again is its primary purpose the payment of a sum of money; its primary purpose is the conveyance of land to secure the repayment of a sum of money; in other words, the document sounds so to speak, in land. Section 71 of the Act I think supports the view I have taken, and it is not unworthy of notice that the English Act, 33 and 34 Vic., c. 97, provides in express terms for the case of mortgages, which our Act clearly does not, unless it does so by virtue of section 51. If this view be not the correct one, then it is obvious that every lease, whether under seal or not, containing a covenant or a promise to pay rent, is equally a promissory note within section 51 of the Act. If this be what the Legislature meant, I think its intention should have been more clearly expressed, and if not clearly expressed I do not feel disposed to extend the operation of the act further than I am compelled to do by plain positive words. I have delayed giving my judgment upon this case, not that I have ever felt much doubt upon the point, but on account of the momentous importance of the objection urged, for if the objection be given effect to, a vast number of mortgages and

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leases must necessarily be rendered void. I order judgment to be entered for the plaintiff on his claim, with costs to be taxed; and also for him and the Registrar of Titles on the counter-claims against them respectively with costs to be taxed.

March 19, 23.

CAVALIER V. BATCHELDOR.

Action on promissory note—Counter-claim—Breach of contract to give time—Wrongful seizure—Costs—A contract to give a certain time is broken if action be brought before such time expires—The forbearance of a third party is a sufficient consideration for such an agreement so as to entitle the other party to recover on breach.

This was an action brought on a promissory note for £52 7s. 6d. by Walter Cavalier, Commercial-road, Prahran, coachbuilder, against Henry P. Batcheldor omnibus proprietor. The action was defended on the ground that the plaintiff had given the defendant a written agreement not to sue for six months from the 1st August The action was brought within the six months. Defendant entered a counter-claim for £2000 damages for wrongful entry and seizure of his livery stables in High-street, Prahran, and for rent.

MR. HIGGINS appeared for the plaintiff; MR. R. H. COLE for the defendant.

The dispute arose during a business relationship between the parties. In June, 1882, and March, 1883, the defendant purchased waggonettes from the plaintiff. In May, 1883, the defendant entered into negotiations with Mr. G. W. Taylor for the purchase from him of land in High-street. A sale was arranged to the defendant. The plaintiff agreed to lend the defendant money to carry out the purchase. An agreement was made whereby an advance of £550 was arranged for by the plaintiff. The plaintiff mortgaged his property and that of the defendant to secure the sum of £1600, which defendant was to get in all. Defendant said he did not know the property was mortgaged for more than £550 until December, 1884. If the business paid the plaintiff was to become a partner. Until December, 1883, defendant carried on business, paying plaintiff the interest on the £1600. A new arrangement was then made. Defendant said he paid the plaintiff various sums of £50 in part payment of the principal, and also for interest. In July, 1884, there was a disagreement. Defendant threatened to go insolvent and close the business. Plaintiff asked him to keep it going a little longer. Defendant said he would not, and offered plaintiff 10s. in the £. On the 10th December plaintiff entered the defendant's premises and had his goods seized.

Evidence having been given,

HIS HONOR said the action was premature, and the defendant was entitled to judgment. He would deliver a written judgment soon, and would consider the case further as to damages.

HIS HONOR, in delivering his reserved judgment as to damages, said: The original action was upon a bill of exchange by Cavalier as drawer and endorser, against Batcheldor as acceptor. No defence was put in to the original action, and thus Cavalier's right to recover upon the bill is admitted. He is therefore entitled to have judgment for the amount of the bill and interest £54 10s. In the counter-claim, Batcheldor puts forward two claims against the plaintiff in the original action—1st, for breach of an agreement not to molest him (Batcheldor) until the 1st February, 1885, and assigning as the breach the bringing of the original action. I consider there was such an agreement made between Cavalier, Dunham, and Batcheldor, and I further consider that Batcheldor performed all the conditions of that agreement which had to be observed by him. Cavalier, in my opinion, committed a breach of it, initiating this action on the 24th December, 1884—in other words, in commencing litigation before the 1st February, 1885. For this reason, amongst others, I decline to give Cavalier costs in connection with the judgment which I order to be entered for him on the bill, and and so declining, order judgment to be entered for Batcheldor on his first counter-claim, for 1s. damages. The second claim is for trespass committed by Cavalier on Batcheldor's premises, and in relation to Batcheldor's goods. These alleged trespasses took place on the 10th December, 1884, and I think they were wrongful, and have not been justified. The agreement to which I have already referred as long as Batcheldor performed the conditions therein stated, continued operative and binding upon both Dunham and Cavalier. Dunham's forbearance, apart from other matters, was a perfectly good consideration for the agreement on the part of Cavalier. As Batcheldor did, in my opinion, perform the conditions to be observed by him, Cavalier was, I think, bound to give him quiet enjoyment, so to speak, till the 1st February, 1885. If this be so, the entry on Batcheldor's premises, and the seizure of all Batcheldor's stock-in-trade on the 10th December, 1884, were clearly wrongful. Consequently Batcheldor is entitled to damages for the entry on his premises and the seizure of his goods, and the damage to his credit and reputation caused thereby. These damages I assess in this view of the case at £75. If, however, the agreement I mention is not susceptible of the effect I have given to it, a number of horses and vehicles were seized and taken possession of by Cavalier, which, in any aspect of the case, he had no right to seize or take possession of. I find, as a fact, that he did seize and take possession of the horses and vehicles to which I refer, as well as of the other goods and chattels mentioned in the schedules to the indenture 30th May, 1883. If then Cavalier had, notwithstanding the agreement of August, a right to enter and seize and take possession of the goods

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and chattels covered by the indenture, he had clearly no right to seize or take possession of the other goods and chattels not covered by that indenture, and in this aspect of the case I assess the damages at £25, contingently on the Court of Appeal, should this case go to a Court of Appeal, holding my former view to be wrong. On the counter-claim, therefore, I order judgment to be entered for Batcheldor for 1s. and £75 respectively, together with costs to be taxed.

PRACTICE COURT.

(Before His Honor Mr. Justice Higinbotham).

March 18.

SIEGERT AND OTHERS v. LAWRENCE AND OTHERS.

Rules of Supreme Court 1884, *Order XXVII., Rule* 11—*Infringement of trade mark—Costs—Where the defendants have innocently and in ignorance infringed the rights of other trades, and have compelled the latter to resort to legal proceedings they should bear the costs—Power of judge to receive evidence of facts by which his discretion as to costs may be regulated in applications under Order XXVII., Rule* 11, *for judgment on default of delivering a statement of defence—Injunction order.*

Motion under Order XXVII., Rule 11, on behalf of the plaintiffs for judgment on the default of the defendants in not delivering a statement of defence.

MR. A'BECKETT for the plaintiffs; MR. HODGES for the defendants.

HIS HONOR said: This was a motion for judgment under Order XXVII., Rule 11, on default by the defendant in delivering a defence. The action was for infringement of a trade-mark, and the only question remaining to be determined is who is to pay the costs. It was contended by Mr. A'Beckett for the plaintiffs, that under the terms of Rule 11, the Court or a judge in determining the relief to which a plaintiff may be entitled, has no power to receive evidence, or to look to anything except the statement of claim, and the affidavit of the omission of the defendant to defend the action. He objected accordingly to the admission of affidavits on the subject of costs filed by the defendants. I think that the statement of claim is referred to in Rule 11 only as indicating the nature and extent of the relief to which the plaintiff may be entitled. The Court or a judge has a discretion, either absolute or limited, in all cases as to the cost of all proceedings subject to the provisions of the Act and of the Rules; and, wherever such discretion exists, the power to receive evidence by affidavit or otherwise of facts by which the discretion may be regulated, exists also in my opinion, unless it is taken away by express words. Accordingly I admitted the affidavits tendered by the defendants. But these affidavits have not satisfied me that the defendants ought to be relieved from payment of the costs. The defendants infringed the plaintiffs' right of exclusive use of their trade-mark, and it was admitted that legal proceedings of some kind had to be taken in order to protect the plaintiffs' right. The terms of the arrangement made between the parties for this purpose appear not to have been clearly defined, and a difference consequently arose as to whether they were carried out according to the original intention. The defendants have innocently and in ignorance infringed the rights of other traders, and have compelled the latter to resort to legal proceedings. It is a lesser hardship that the defendants, rather than the plaintiffs, should bear the costs. I have been referred on this question to the cases of *Upmann v. Elkan*, L. R., 7 Ch. App., 130, and *Upmann v. Forester*, 24 C. D., 231. Judgment for the plaintiffs, with costs on the higher scale. Ordered that the defendants be restrained by injunction in terms of the plaintiffs' statement of claim, and that the defendants deliver to the plaintiffs the bottles in the statement of claim mentioned, and any similar bottles in the defendants' possession or control for the purpose of having the imitation labels mentioned in the fifth paragraph of the statement of claim removed therefrom, or cause or enable such labels to be otherwise removed. Reserve leave to apply.

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

March 12.

LOCAL BOARD OF HEALTH OF BALLARAT EAST v. CARVALHO.

Health (Amendment) Act 1867 (*No.* 310), *Sec.* 47—*A local board cannot sue under sec.* 47 *of Act No.* 310, *until notice has been given of the amount due.*

Appeal from Petty Sessions, Ballarat.

MR. BOX for the appellant; MR. GOLDSMITH for the respondent.

The defendant, Mr. A. T. D. Carvalho, was the owner of property in Humffray-street, Ballarat East. In October, 1882, he was served with notice under the Health Act No. 310, requiring him to form the land at the rear of the premises. He did not comply with the notice, and, acting under the powers of the Act, the board itself did the work The amount which the defendant was to pay was fixed by the local board in April, 1883, at £10 5s. They served notice of demand of this sum by leaving it on the premises. Carvalho was then absent in Europe, and did not return to Victoria till September, 1883, and then they served him with notice personally, requiring him to pay. As he failed to do so, they, in June, 1884, summoned him to the police court for the amount. The justices held that they had no jurisdiction, inasmuch as by section 51 of the Justices of the Peace Act the complaint should have been laid within twelve months of the time when the matter of the

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complaint arose, and in this case the matter of the complaint they held arose in April, 1883, when the board fixed the amount owing to him, and they dismissed the case. Against this decision the complainants appealed. It was contended for the appellants that they could not sue until they had informed the person who had to pay what amount was due. It had been so decided in England in a precisely similar case of *Labalmondiere v. Addison* (1 E. & E. 41). It was contended for the defendant that the claim arose when the notice was given, in October, 1882, that the provisions of the Act would be enforced against the defendant, and he must then be taken to know the amount he would have to pay.

MR. JUSTICE HIGINBOTHAM said that he could not distinguish this case from the one that had been cited, and it was only reasonable that a notice to pay should be given, so that a man might know what his liability was.

MR. JUSTICE WILLIAMS had great doubt about the matter, and were it not for the authority of the case cited he would have taken time to consider, as he thought the debt accrued directly the local board fixed the amount payable under section 47 of the Act 310. But he was not so strongly convinced of that opinion as to differ from the English authority.

MR. JUSTICE HOLROYD said that although they had a right to differ from an English decision, yet where the case was one of authority in the English courts—unless they were convinced it was wrong—they ought to follow it.

Appeal allowed.

HUGHES v. SAWYERS. March 13.

Landlord and tenant—Injury to tenant where a landlord lets a house to a tenant and contracts with him to do certain repairs, and by reason of his breach of contract any person lawfully introduced by the tenant into the house is injured, the landlord is liable directly to the person so injured.

Appeal from the County Court, Melbourne. The action was originally brought in the Supreme Court by Christopher Hughes against James Sawyers, to recover a sum of £2000 damages for injuries sustained by the plaintiff by reason of Sawyer's carelessness and negligence. The action was remitted to the County Court for trial, and was heard before a judge and a jury on the 21st October, 1884, when a verdict was given for the plaintiff for £800. The verdict was set aside, a nonsuit was entered, and the plaintiff appealed.

MR. MITCHELL for the appellant; DR. MADDEN for the defendant.

The evidence for the plaintiff at the trial was to the effect that in August, 1883, J. M. Cregan, a brother-in-law of the plaintiff's, leased from the defendant a house at the corner of Inkerman and Chapel-streets, St. Kilda. The house was to be occupied by the plaintiff as a grocer. The defendant said that the place would be all ready by the 23rd August, but that there was a lot of papering and gasfitting going on. He said the gasfittings would be all ready by the 25th August. On the 24th August Hughes called at defendant's house. He saw Mrs. Sawyers, and, in consequence of what she said, he went to the premises at five o'clock on the evening of the 25th with his family. Mr. Sawyers came in as he was putting up the beds. Hughes spoke to him. Sawyers said that it was tedious in getting it done, but it was now all right. Afterwards Hughes went down stairs at about half-past nine o'clock. He smelled gas; went to the parlour, opened the windows top and bottom. He saw there was no gasalier in the parlour. He brought in a ladder, saw that the gaspipe was unstopped, and that there was no plug in it. He got a cork, put it in, and came back about ten minutes afterwards. He called for a candle to see if the cork was in properly. The candle was brought; he went half-way up the ladder with it, and then the explosion took place, knocked him down, and set fire to him. The evidence of Mrs. Hughes was to the effect that on the 25th August Sawyers went to the house about five o'clock. He said the gas was all right, and sent the girl for a box of matches He went to the front room (bedroom) and lit the gas, and said "the gas is all right now," and turned it off again. Previously to doing this he had been down stairs and all through the house. She did not turn on the meter. The defendant came the same night to the house, after the explosion, and said it was very careless on his part, and that they were to make their minds easy as he would have to recompense the plaintiff for the accident. The evidence of Cregan was to the effect that plaintiff was to occupy the premises, and carry on the business, although the lease was to be in his (Cregan's) name, and it was distinctly agreed that defendant was to put the gas in proper repair. The defendant, in his evidence, denied the statements for the plaintiff as to his turning on the gas, and saying it was all right, or that he had promised to give compensation. He employed a competent plumber, who stated that he left the house on the day of the accident. He left the hanging tube in the parlour. He stopped it with a small medicine bottle cork, which was a usual way of stopping a gas tube before fittings are attached. On this evidence it was contended on behalf of the plaintiff that it appeared that he was in the house at the invitation of the defendant for the transaction of business, and that the defendant was therefore answerable for any accident that might have occurred through carelessness of himself or servants, but the defendant was also answerable as landlord of the plaintiff, because he had promised to put the premises in repair; and lastly, that there was evidence that he had personally been guilty of negligence.

MR. JUSTICE HIGINBOTHAM said that although

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it was difficult to apply general principles to any particular case, yet he thought that the facts of this case brought it within the principle laid down in *Indermaur v. Dawes*, L. R. 1 C. P. 274, establishing the liability of the defendant. That case, and others of the same class following it, laid down the principle in cases of real property (which was afterwards extended to personal property), that if the owner of premises expressly or impliedly invited another person to go upon his premises for the purpose of transacting business in which the owner of the premises was interested, that owner was under the obligation to protect the visitor from danger arising out of the defective condition of the premises, which the owner knew or ought to know. In this case, he thought the evidence showed that the plaintiff was on the premises for the transaction of business in which the defendant was concerned. The agreement between the defendant and the plaintiff's brother-in-law was that the defendant should put the premises in repair, and those repairs included repairs to the gasfittings. The rent was to commence from the 25th August, 1883, and the plaintiff went to the house on that day. The defendant came apparently to inspect the repairs, and to give possession. He remained for some time examining the house, and then left, the gas being apparently all right. It had been left by the plumber all right in the early part of the day. Someone, however, took out the plug. The defendant had at that time still a duty to hand over possession of the house to the plaintiff, and there was evidence from which a jury might infer that at that time the gasfittings were in an unsafe and dangerous condition. The plaintiff was in the position of a person who was invited to a house that was in a defective condition, which the defendant had previously arranged to repair, and that defendant went there in his capacity as landlord to see that the repairs were made, and the plaintiff was there to see that the landlord gave him possession of the premises in a proper state of repair. On the principle, therefore, that the plaintiff was there by the invitation of the landlord for the transaction of business, the defendant was answerable. But there was also another principle on which the defendant was liable, which was stated in a Scotch case cited in *Ivay v. Hedges*, L. R. 9 Q. B. D. 580 (*M'Martin v. Hannay*, 10 Court of Sessions Cases 411), and *Nelson v. The Liverpool Brewery Company*, L. R. 2 C. P. 311, that a landlord is liable for injury to a stranger by the defective repair of his premises, when he has contracted with the tenant to repair them, or when he has been guilty of misfeasance, as for instance in letting premises in a ruinous condition. In this case the defendant had promised the plaintiff's brother-in-law, who was to take the lease, to put the premises in repair, and he was therefore liable if he had not fulfilled his agreement. There was another aspect of the case in which the plaintiff was entitled to succeed. The judge at the trial left it to the jury to say whether the defendant had been guilty of negligence directly causing the injury. And there was some evidence that the defendant, by his own act, as a mere stranger, committed an act of negligence by which the plaintiff was injured. There was evidence that he had admitted shortly after the accident that it occurred through his carelessness, and he promised compensation. For these reasons he thought the appeal should be allowed, the nonsuit set aside, and a verdict entered for the plaintiff for the amount, £800, found by the jury.

Mr. Justice Williams said that, in his opinion, there was evidence to go to the jury that the injury to the plaintiff was caused by the personal negligence of the defendant, and if that were so it was unnecessary to consider whether the plaintiff was in the house as a licensee or whether he was there by the express or implied invitation of the defendant. The plaintiff was not a trespasser; he was lawfully in the house, and it was a question for the jury whether, on the evidence, it appeared that he had been injured by the act of the defendant. He reviewed the evidence given at the trial, and said he was of opinion that Mr. Justice Holroyd was prepared to assent to the principle that where one man, by an act not of omission but of negligence, injured another, he was liable for the consequences. In this particular case he was more inclined to rest his judgment upon the principle laid down in *M'Mahon v. Hannay*, cited in L. R. 9 Q. B. D., and in *Nelson v. The Liverpool Brewery Company*, which established the proposition that where a landlord lets a house to a tenant and contracts with him to do certain repairs, and by reason of his breach of contract any person lawfully introduced by the tenant into the house was injured, the landlord was liable directly to the person so injured. The reason seemed to be this, that inasmuch as the landlord had contracted to do these repairs for the tenant, a duty was thrown upon him in regard to any of the persons who might be lawfully admitted to the house, to see that they were not injured by any neglect in performing his contract. If the contract had not been made the duty would not have arisen. It was on the same principle, if a railway company contracted with A to carry B safely, and broke that contract, and B was injured, B would be entitled to sue for the injury he sustained. The only difference between the two classes of cases was, that in one the individual who happened to be injured was named in the contract, in the other he was not, but was only one of a class. There was evidence here that the defendant had promised to make certain repairs before the tenant went into possession, and until it was shown they were done, and he was satisfied that they were done, he must be taken to be aware that they were not done. He was answerable for the acts of the person whom he employed. He had some doubts about the first

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principle on which Mr. Justice Higinbotham had based his decision, for he doubted whether it could be said that the plaintiff had gone on the premises at the invitation, express or implied, of the defendant for business in which they were both interested. The defendant had no power to give such an invitation, as the tenant was in possession, and was put in possession by the defendant. No invitation could be given where there was no lawful power to give it.

Appeal allowed with costs; nonsuit set aside, and judgment entered for the plaintiff for £800.

Ex parte DOBSON. March 14.

Regulæ Generales, 11*th April*, 1874, *Rule* 18—*A person before entering into articles must produce a certificate of his having passed a matriculation examination at the Melbourne University, or at some university recognised by the Melbourne University.*

Application for leave to Mr. Dobson, before entering into articles of clerkship to a solicitor, to produce at any time within 12 months from this date, certificates of having taken the degrees of B.A. and LL.B. at the University of Cambridge.

MR. BOX in support of the application.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court said: Mr. Box applies that leave might be given to Mr. Dobson before entering into articles, under rule 18, of April 11, 1874, to produce at any time within 12 months from this date, certificates of having taken the degrees of Bachelor of Arts and Bachelor of Laws at the University of Cambridge. The question of the amendment of this rule is now under consideration. We abstain, therefore, from expressing an opinion as to whether the production of such certificates would or would not be in compliance with the terms of the rule. As it stands at present, it requires that a person before entering into articles must produce a certificate of his having passed at a matriculation examination in the University of Melbourne in a certain number of subjects fixed for the examination, or of having "passed at a matriculation examination" in some university recognised by the University of Melbourne. The rule further requires that the certificate must be produced to the board of examiners for attorneys before the applicant enters into articles. We do not think that we are at liberty to sanction a departure from the express provisions of a rule made under the authority of Act 15 Vict., No. 10, section 32, as we recently held in the case of *ex parte Gair*, 10 V. L. R. (L.) 108. Upon these grounds the present application is refused.

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

Re CRANE. March 19.

Administration—Presumption of marriage—where a man and woman have lived together for years as husband and wife, and have been regarded as such by their neighbours without suspicion, the presumption is that there has been a legal marriage.

Application that letters of administration be granted to the eldest son of the intestate; the widow having renounced her rights.

MR. A'BECKETT for the applicant.

HIS HONOR, in delivering judgment, said that there was some difficulty as to the marriage between the mother of the applicant and his father. The marriage was said to have taken place in 1858. Her account of it was that she and her husband agreed to be married, and they met at a certain house in Melbourne, where there were some friends. A clergyman, or a person in the array of a clergyman, whose name was "Mac" something (she had forgotten the name) performed the ceremony of marriage. On account of the name "Mac" she thought he was a Scotchman, but the marriage service performed was that of the Church of England. She was at the time under age. The Act then in force relating to marriages was the 6 and 7 William IV., section 6 of which provided that if a minor desired to get married there must be the consent of the parent if there was one alive. In this case the mother was alive, and it did not appear that she consented to the marriage. There was no written evidence of the marriage. There was, however, other evidence; a number of persons had made affidavits that Crane and the applicant's mother had lived together for years as husband and wife, and had been regarded as such by the neighbours without any suspicion. Under such circumstances, on the authority of *Peers v. Peers*, 2 H. L. C. 231, the presumption was in favour of there having been a legal marriage, and on the whole he thought there was sufficient evidence of a legal marriage in this case. He was not dealing with any question as to the distribution of property, but only whether the applicant had established a claim to be entitled to administration.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham).

NICHOLSON v. ROFF. Feb. 27.

Rules of Supreme Court 1884, *Order XXXI., rule* 1 *—Interrogatories—A general summons for directions is the proper way to raise all matters between the parties—Where an application for leave to deliver interrogatories is made not under a general summons it should be made* ex parte.

Application under Order XXXI., rule 1, on behalf of the plaintiff calling upon the defendant to show cause why interrogatories should not be delivered.

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DR. MADDEN, in support: The action is one for libel. The statement of claim alleges that the defendant "wrote and published, or caused to be written or published," certain libellous matter concerning the plaintiff. The defendant has denied that he "wrote and published," but has not denied that he "caused to be written and published." The plaintiff seeks to interrogate the defendant on this head. This application is made on summons. The case of *Nixon v. Milton*, 6 A. L. T., page 114, decided that an application of this nature, not made on general summons, should be made *ex parte*, but I submit that that decision was incorrect. Order XXXI., rule 2, seems to show that the attendance of the other side is necessary in applications of this nature for it deals with offers, &c., which could only be made by them. *Hall v. Liardet*, W. N., November 10, 1883, page 165, does not decide that a summons is to be dispensed with. Mr. Justice Williams, in an unreported case, questioned the correctness of the decision in *Nixon v. Milton*.

MR. ISAACS appeared on the summons on behalf of the defendant, but did not go into the merits.

HIS HONOR said: I allow these interrogatories. A general summons for directions is the proper way to raise all matters between the parties. Under it you can bring any matter under the notice of the judge up to the time of trial. I think that where an application is made, as in this case, not under a general summons, such application should be made *ex parte*; but the practice does not appear to be settled. Order as asked. I certify for counsel.

Solicitor for plaintiff: *Dixon*.

(Before His Honor Mr. Justice Williams).

VIRTUE V. YOUNG AND ANOTHER.

March 18.

Rules of Supreme Court 1884, *Order XIX., rules* 13, 17, 19—*Pleading—The defendants, to certain paragraphs of the statement of claim, pleaded that "they deny each of the allegations, &c.;" and to others that "they do not admit any of the allegations, &c."*—Held, *that such pleas were well pleaded.*

Application on behalf of the plaintiff calling on the defendant to show cause why paragraphs six, seven, eight and nine of the statement of defence should not be struck out on the grounds that the said paragraphs disclose no reasonable answer, and are evasive denials of the allegations in the statement of claim. The action was brought by the assignee of the insolvent, Andrew Young, to have certain transfers and a bill of sale, made by the insolvent to his children, the defendants, set aside on the ground that they were fraudulent and void as against the plaintiff as assignee, and as against the creditors. The statement of claim contained, amongst others, the following paragraphs:—

6. For some time prior to the execution of such last mentioned documents the said Andrew Young had cruelly ill-treated his wife, and his said wife had, on divers occasions, threatened to take legal proceedings against him, and at the time of the execution of such documents he anticipated that his wife would be driven to take such proceedings against him.

7. For the space of two years or thereabouts after the said transfers, conveyances, and bill of sale were executed, the said Andrew Young continued to reside on and carry on his business as a farmer on all the properties mentioned in the above transfers and conveyances, and remained in possession of all the said lands and the chattels comprised in the bill of sale, and used the same as his own property.

8. On 14th April, 1882, the wife of the said Andrew Young presented a petition for judicial separation, on the ground of the cruelty of the said Andrew Young to her; and the said petition was duly accepted, and on her application for alimony in May, 1882, she learnt for the first time that the said Andrew Young had purported to dispose of all his property as aforesaid.

9. In October, 1882, a writ of attachment was issued against the said Andrew Young for contempt of Court in not paying the taxed costs of his wife on such petition and application, but the said Andrew Young kept in hiding till November 24th, 1883, when he voluntarily sequestrated his estate, his creditors being his wife for the taxed costs as above mentioned, the solicitor who prepared the documents of February, 1880, and certain persons who have supplied necessaries to his wife since the beginning of 1882.

To these paragraphs the defendants pleaded.

6. They deny each of the allegations of the 6th paragraph of the statement of claim.

7. They deny that after the transfers, conveyances, and bill of sale, the said Andrew Young carried on his business as a farmer for two years or any shorter term on all or any of the properties mentioned in the transfers and conveyances or remained in possession of any of the lands or chattels comprised in the bill of sale, or used the same as his property.

8. They do not admit any of the allegations of the 8th paragraph of the statement of claim.

9. They do not admit any of the allegations of paragraph 9 of the statement of claim except that Andrew Young sequestrated his estate as therein alleged.

MR. BARRETT in support; MR. A'BECKETT to oppose.

HIS HONOR said: Summons to strike out the 6th, 7th, 8th, and 9th paragraphs of the defence on the grounds that those paragraphs disclose no reasonable answer, and are evasive denials of the allegations in the statement of claim; also for leave to the plaintiff to add certain persons as defendants. I am quite clear the 7th paragraph of the defence is well pleaded, but I have had some considerable doubt as to whether, under the new rules, particularly rules 13, 17, and 19 of Order XIX, paragraphs 6, 8, and 9, should be allowed to stand.

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There is a marked tendency on the part of pleadings under the new system to become prolix, which, if encouraged, would not only entail much unnecessary expense upon suitors, but would also cause confusion, greater than already exists, as to what are the precise and material issues joined between the parties. I deem it to be my duty to deal with points of pleading when submitted to me in such a manner as will render them as concise as it is possible to make them consistently with the rules as to pleading under the new system. Actuated by this feeling I am disposed to allow paragraphs 6, 8, and 9 to stand in addition to paragraph 7. Not to do so would be establishing a precedent which by degrees would lead to statements of defences being in some cases intolerably prolix, cumbersome, and confusing. I do not think that I am violating any of the provisions as to pleading nor in especial rules 13, 17, and 19, or any of them in allowing these paragraphs to stand. Taking rule 13 first, the allegations of fact in the corresponding paragraphs of the statement of claim are, by the paragraphs to which objection has been taken, denied either specifically or by necessary implication. In other words, the defendant does not deny, generally, the facts stated in the statement of claim. That this is what is meant is shown, I think, by rule 17, and the distinction I have pointed out between general denials or general non-admissions, and the denials and non-admissions, paragraph by paragraph in the present case, answers the argument founded on rule 17 equally with that founded on rule 13. Nor is this view inconsistent, in my opinion, with the decisions in *Harris v. Gamble*, 7 C. D., p. 877; and *Shutter v. Tregent*, 12 C. D., p. 758, which were pressed upon me in argument in support of the summons. In the former case, the effect of the statement in the defence was neither to admit nor to deny. The defendant did not state that he did not admit, but stated in the most general way that he "put the plaintiff upon proof of all the allegations in his statement of claim." In the latter case, the defendant did not state that he did not admit the facts stated in the claim, but that he "did not admit the correctness of the facts, and required proof." Nor lastly do I think that the paragraphs objected to are in violation of rule 19. There is nothing evasive (see ground stated in summons) in either the denials or non-admissions; each paragraph of the statement of claim is dealt with separately by a corresponding paragraph of the statement of defence, and each denial or non-admission is absolute and unambiguous in its terms. There is no denial or non-admission *modo et forma* or "as alleged," or anything of that description; in other words there is nothing tricky or in the nature of a "negative pregnant" in either denial or non-admission. I am therefore of opinion that all the paragraphs that have been objected to are well pleaded. The summons will be dismissed as to this part; granted as to the leave to add the defendant's costs of the summons in the cause. Counsel certified for. Plaintiff to pay the costs of, and occasioned by, the amendment.

AITKEN V. ETTERSHANK. March 21.

Rules of Supreme Court 1884, *Order XXXI., rules* 12, 26—*Discovery of documents—The £5 required by rule* 26 *to be paid into Court must be paid in before the summons for discovery is taken out.*

Application on behalf of the plaintiff under Order XXXI., rule 12, for discovery of documents.

MR. BARRETT, in support: This is an application for discovery of documents before delivery of the statement of claim. This application was made to your Honor before, but was adjourned so as to enable the plaintiff to show by affidavit that discovery at this stage was necessary.

HIS HONOR, having read the affidavits, asked whether there was any objection to the application.

MR. ISAACS, to oppose: Order XXXI., rule 26, requires that the sum of £5 shall be paid into Court before the application for discovery is made. This has not been done, so that your Honor has no jurisdiction to order discovery.

HIS HONOR said: I think the objection fatal. The money ought to have been paid into Court before the summons was taken out. I cannot allow the money to be paid in now. A fresh summons must be taken out. As the objection was not taken when the matter was previously before me, I will dismiss the summons without costs.

March 25.

CUSSEN AND ANOTHER V. MACPHERSON.

Judicature Act 1883 (*No.* 761), *sec.* 59—*Foreign procedure—Where the agreement was made, and the breach occurred out of the jurisdiction, the plaintiff, to entitle him to proceed in Victoria, has to satisfy the judge that some substantial part of the action arose in Victoria.*

Application on behalf of the defendant calling upon the plaintiffs to show cause why the writ of summons in this action and the service thereof upon the defendant should not be set aside.

The action is for work and labour done by the plaintiffs for the defendant in effecting the sale of a station called Moerlong belonging to the defendant. The writ of summons was one for service out of the jurisdiction. The affidavit of the defendant states that the defendant resides, and has resided for the last twelve years, in South Australia; that he was served with the writ in South Australia; that if he did employ the plaintiffs to sell the Moerlong station (which he does not admit), that such employment was given by him wholly in South Australia, and the cause of action arose there; that any interview or negotiations with Ferrier, the purchaser, with reference to the Moerlong station took place entirely within the province of South

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Australia; that the Moerlong station is wholly situated in South Australia; and that the Moerlong station is still in his possession, and has not been sold by him to Ferrier. The affidavit of the plaintiff Cussen stated, in answer, that the defendant retained the services of the plaintiff and his partner to sell the Moerlong station, and that instructions were given, as alleged, in South Australia; that the defendant knew that the plaintiffs were living and carrying on business in Victoria; that the plaintiff met Ferrier in Victoria and sent him to the defendant's manager, and he was introduced to the defendant, who sold the Moerlong station to him there and then; that a proper contract for sale was drawn and signed by both the defendant and Ferrier, and Ferrier paid a deposit of about £450 on his purchase; that Ferrier would not proceed with his purchase, and forfeited his deposit to the defendant; that the purchaser for the Moerlong station was procured by the plaintiff in Victoria, and the work and services in and about the sale were undertaken in Victoria; and that the defendant resides in Victoria and has considerable property in this colony. The defendant filed an affidavit in answer, stating that, to the best of his belief, he never instructed the plaintiffs to sell Moerlong station; that Ferrier was sent by the plaintiffs as a purchaser for the Doradong station, situated in Victoria, and not as a purchaser for the Moerlong station, in South Australia; that Ferrier declined to purchase the Doradong station; that the defendant's overseer saw Ferrier at Doradong station and told him that the Moerlong station was for sale, and he inspected the Moerlong station entirely at the suggestion of the overseer, and, as the defendant believes, without the plaintiffs having mentioned to him that the Moerlong station belonged to the defendant, or that it was for sale; that Ferrier agreed to purchase the Moerlong station, and gave a deposit, but declined to complete the purchase, and that the fact of the purchase not having been completed was owing to Ferrier, and not in any manner to any act or default of the defendant's, and that the defendant does not reside in Victoria, but has resided for the last twelve years in South Australia.

Mr. Moule in support; Mr. Leon to oppose.

His Honor said: This is a very important point and involves some difficulty. One of the earliest acts dealing with persons out of the jurisdiction is the Common Law Procedure Statute 1865, beginning with sec. 211. To entitle a person to proceed under that section he had to satisfy the judge that the cause of action arose within Victoria. In *Wilson v. Threlkeld*, 3 W. W. & A'B. (L.) 158, the Court distinctly laid down the principle that it would be sufficient if it were shown that a part of the action arose in Victoria. I would qualify that by saying that it must be some substantial part. Then we have the County Court Statute 1869, sec. 5, which provides that where it shall appear that at the time of the commencement of the suit the defendant, or one of the defendants did not reside or carry on business, and that the cause of action or suit did not arise, either wholly or in some material part within, etc., the plaintiff shall be nonsuited. This was really doing by legislation what the Court had done before. Under this section it has been decided that it is sufficient to give the Court jurisdiction if the work, or a substantial part, of it was done within the jurisdiction. Then we come to sec. 59 of the Judicature Act 1883, which is the substitute for our foreign attachment. Applying this principle to this case, which is an action for work and labour done, I think it is sufficient if a part arose within the jurisdiction. Although I am quite satisfied that the agreement was made in South Australia, and the breach occurred in South Australia, yet the doing of the work, viz., finding of the purchaser, was done in Victoria, which is a material part of the work. I therefore dismiss this summons. Costs to be costs in the cause. I certify for counsel.

Solicitors: For plaintiffs, *Hart* and *Benjamin*; for defendant, *Moule* and *Seddon*.

Heselton v. Crozier. March 26.

Rules of Supreme Court 1884, *Order XVI.*, *rule* 48 —*Indemnity—Applications under Order XVI.*, *rule* 48, *must be limited to cases coming strictly within the words of the rule.*

Application on behalf of the defendant for liberty to issue a notice claiming indemnity over against Christina Ryland, pursuant to the rules of the Supreme Court, Order XVI., rule 48, and for further time to deliver his statement of defence.

Mr. Barrett, in support: The action is for recovery of land, and is brought by the mortgagee against a lessee of the mortgagor. The defendant wants to bring in the mortgagor. The addition of the mortgagor cannot prejudice the plaintiff. The only question for the judge is whether the defendant has a plausible case.

Mr. Hodges, to oppose: Order XVI., rule 48, is expressly limited to cases where the defendant is entitled to contribution or indemnity over against any other person. This is an action of ejectment, and the defendant cannot say that he is entitled to indemnity against the mortgagor. To enable the defendant to bring in another there must be a contract of indemnity (*Speller v. Bristol*, S. N. Co., 13 Q. B. D. 96).

His Honor said: I think applications of this nature must be limited to cases coming strictly within the words of rule 48. I do not think this is one of those cases. The reason for the defendant wishing to join the third party is simply to enable him, if he should be ejected, to sue his landlord. I dismiss the summons, costs to be plaintiff's costs in the cause. I certify for counsel.

Solicitors: For plaintiff, *Fink*; for defendant, *Pentland* and *Roberts*.

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March 27.

THE SQUATTING AND INVESTMENT CO. LIMITED v. PERMEWAN, WRIGHT AND CO. LIMITED.

Summons to strike out pleading—Reply to counter-claim embarassing—Delivery of particulars—Breach of agreement to carry goods on certain terms and conditions—Counter-claim for price of carriage—Reply that conditions of carriage unfulfilled—Such reply is a good one.

Application on behalf of the defendants calling upon the plaintiffs to show cause

1. Why so much of paragraph 1 of the plaintiff's reply to defendant's counter-claim should not be struck out on the ground that the same discloses no reasonable cause of defence, and is vexatious, and further that it tends to prejudice, embarass, and delay the fair trial of the action.

2. Why the plaintiffs should not deliver particulars so as to identify which of the said goods carried by the defendants for the plaintiffs, and set out in the particulars delivered along with defendant's counter-claim, are the 100 tons which the plaintiffs admit they requested and agreed with defendants to carry.

3. Why the plaintiffs should not deliver particulars (with dates, sums, and names of persons to whom paid) of the payments alleged by them to have been made in discharge of the claim of the defendants made in the counter-claim.

The pleadings were as follows:—

STATEMENT OF CLAIM.

1. The plaintiffs at the time of making the agreement hereinafter mentioned were, and still are, the owners of Thuralgoona Station, and the defendants were carriers of goods for reward.

2. At the said time the plaintiffs had in their woolshed on Thuralgoona Station about 1500 bales of wool which, if they remained there, would greatly retard shearing operations and certain goods were wanted on the said station without which the shearing could not be done, and shearing could not be done at all at the said shed in which the said wool was stored until the same was removed, and on account of the drought, and of the serious injury there would be to the wool on the sheep, and to sheep if not soon shorn, it was of great importance that the sheep on the said station should be speedily shorn; of all which facts, the defendants at the time of making the contract set out in the next paragraph were informed, and for the purpose of getting the said goods speedily to the said station, and the said wool speedily away from the said station, the said contract was made and entered into by the defendants.

3. On or about the 27th May, 1884, it was agreed by and between the plaintiffs and defendants that the defendants would carry 100 of such goods of the plaintiffs as plaintiffs should direct, from Nyngan to Thuralgoona. That the said goods should be conveyed from Nyngan to Thuralgoona by horse teams; that with the exception of the team taking a certain boiler, no one team should take more than three tons of goods to the said station; that the greater portion of the said goods should be delivered on the said station on or before the 31st July, 1884, and that the utmost despatch should be used in conveying from Nyngan to Thuralgoona the whole of the said goods; that they would convey from Thuralgoona to Nyngan the said 1500 bales of wool, and that each team that took goods to the said station should take a load of the said 1500 bales of wool away from the said station, until the whole of the said wool was removed; and that the plaintiffs should pay to the defendants at the rate of £20 per ton for each ton of the said goods delivered at the said station, and £10 per ton for each ton of the said wool delivered at Nyngan. The defendants conveyed portion only of the said goods from Nyngan to Thuralgoona by horse teams. None of the said goods were delivered on the said station on or before the 31st day of July, 1884. Despatch was not used in conveying any of the said goods from Nyngan to Thuralgoona. Each team that took goods to the station did not take a load of the said wool away.

4. By reason of the aforesaid breaches of contract the plaintiffs' sheep could not be shorn at the proper time, and shearing was delayed for a long time, and all or nearly all the water at and near the shearing sheds and the paddocks containing the shearing sheds, was dried up, and the grass therein consumed before the arrival at the said station of the said goods, and large numbers of the sheep died, and the wool on the said sheep deteriorated, and the plaintiffs incurred expense in and about erecting a shed in which to place a portion of the said 1500 bales, so as to allow shearing to go on; and in removing the bales to the shed so erected.

Particulars of special damage. The plaintiff claims £30,000.

STATEMENT OF DEFENCE.

The defendants say that:—

1. The defendants do not admit that at the time of the making of the alleged contract in the plaintiffs' statement of claim set out, the plaintiffs had in their woolshed at Thuralgoona Station about 1500 bales of wool, which, if they remained there, would greatly retard shearing operations, and the defendants do not admit that certain goods were wanted on the said station without which the shearing could not be done; and the defendants do not admit that shearing could not be done at all at the said shed in which the said wool was stored until the same was removed; and the defendants do not admit that there would be serious injury to the wool on the sheep and to the sheep, if not soon shorn, and that it was consequently of great importance that the said sheep on the said station should be speedily shorn, as in the second paragraph of the statement of claim is alleged.

2. The defendants deny that at the time of the making of the alleged contract in the third

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paragraph of the statement of claim set out, or at the time of making any other contract with the plaintiffs that the defendants were informed of all or any of the facts set out in the second paragraph of the plaintiff's statement of claim, and referred to in the first paragraph of this defence; and the defendants deny that for the purpose of getting the said goods therein referred to speedily to the said station, and the said wool speedily away from the said station, the said alleged contract was made or entered into by the defendants as in the said second paragraph is alleged.

3. The defendants deny that there were terms of the said alleged agreement between the plaintiffs and the defendants set out in plaintiffs' statement of claim herein that the defendants would carry 100 tons of such goods of the plaintiffs' as the plaintiffs should direct from Nyngan to Thuralgoona, and that the said goods should be conveyed from Nyngan to Thuralgoona by horse teams, and that, with the exception of the team taking a certain boiler, no one team should take more than three tons of goods to the said station, and the defendants deny that there were terms of the said alleged agreement that the greater portion of the said goods should be delivered on the said station on or before the 31st July, 1884, and that the utmost despatch should be used in conveying from Nyngan to Thuralgoona the whole of the said goods, and they deny that there were terms of the said alleged agreement that he would convey from Thuralgoona to Nyngan the said 1500 bales of wool and that each team that took a load of the said goods to the said station should take a load of the said 1500 bales of wool away from the said station until the whole of the said wool was removed.

4. The defendants say that due dispatch was used in conveying all of the said goods of the plaintiffs from Nyngan to Thuralgoona.

5. The defendants say that it was a term of the said alleged agreement in the plaintiffs' statement of claim set out that the defendants should not be liable for any loss, damage, or injury, which might happen, or arise, or be caused by reason of the defendants being delayed or hindered in consequence of drought or flood, or from any other cause beyond their immediate control, and the defendants say that if any damage and loss, such as the plaintiffs allege, was cause to reason of the defendants not speedily delivering the said goods (which allegation, however, the defendants do not admit) then the defendants say that the same happened and arose, and was caused by reason of the defendants being delayed and hindered in consequence of drought and flood.

COUNTER-CLAIM.

The defendants say that—

1. The plaintiffs were, and still are, owners of the Thuralgoona Station, and the defendants were carriers of goods for reward at the time of the working of the agreement in the next paragraph mentioned.

2. It was agreed between the plaintiffs and the defendants that the defendants would take and convey, from Nyngan to Thuralgoona, all stores and other articles, that the plaintiffs should deliver to them at the rate of £20 per ton for each ton of such goods so carried, as aforesaid, to be paid by the plaintiffs to the defendants, as delivered upon production of the several receipted way bills for the said goods.

3. In pursuance of the said contract the defendants have carried from Nyngan to Thuralgoona divers, to wit 187 tons 7 cwt 2 qrs of goods, and the defendants have produced to the plaintiffs the receipted way bills for the said goods, yet the plaintiffs have wholly neglected and refused to pay for the carriage of the same.

4. The defendants claim at the rate of £20 per ton for the carriage of the said 187 tons 7 cwt 2 qrs of goods.

5. The defendants also claim for money paid for plaintiffs by the defendants, at their request, and for money payable for work done and materials provided for the plaintiffs by the defendants at their request, and for money payable for commission and reward due from the plaintiffs to the defendants in respect of the carriage of certain goods from Sydney to Nyngan.

6. Full particulars of the damages claimed under paragraphs 4 and 5 of this counter-claim exceed 3 folios and will be delivered along with these pleadings.

The defendants counter-claim £4500.

REPLY.

The plaintiffs as to the defence say that—

1. They join issue.

The plaintiffs as to the counter-claim say that—

1. As to paragraphs 2, 3, 4, and so much of 5 as relates to work done, they repeat paragraph 2 and 3 of the claim herein, and say that the same are true, and that the agreement therein set out is the only agreement between the plaintiffs and the defendants, and that the said agreement related only to the carriage of 100 tons of stores and other articles, and the defendants broke the said agreement as alleged in paragraph 3 of the claim herein, and by reason of the said breaches of the said agreement the work done by the defendants in the carriage of the said 100 tons was of much less value than £20 per ton and was only worth a much less sum per ton, and the plaintiffs neither requested nor authorised the defendants to carry the remaining 87 tons 7 cwts 2 qrs.

2. As to the residue of paragraph 5 of the counter-claim, the plaintiffs did not request the defendants to pay the said money or any part thereof, nor did the plaintiffs employ the defendants on or about the carrying of the said goods from Sydney to Nyngan.

3. As to paragraph 5 they satisfied the defendant's

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claim by payment before the counter-claim herein to the defendants in and about the months of March to October, 1884.

MR. MITCHELL, in support: The reply contains matter which the plaintiffs are not entitled to set up against the defendants' counter-claim. The defendants having performed their part of the contract this matter ought to be the subject of a cross action.

MR. HODGES, to oppose: The plaintiff is not entitled to have a double action against the defendants This contract was a contract for which an extraordinary price was given for carrying these goods at an extraordinary time. The defendants did not send them according to contract, and the plaintiffs say that the work done is not worth the price agreed upon. The defendant may be entitled to something he has done under the contract, although he has not acted in accordance with the contract notes to *Cutter v. Powell*, 2 S. L. C. The defendants claim on a special contract which the plaintiffs say is not the actual contract. The defendants are entitled to a *quantum meruit*, but not to the whole amount.

HIS HONOR said: In my opinion the plaintiffs' reply is well pleaded. The statement of claim is for breach of an agreement to carry certain goods on certain terms and conditions which are set out in the statement of claim, and agreeing to pay a certain price per ton for a certain portion of the goods to be carried on the faith that these conditions would be observed. To that statement of claim there has been put in a statement of defence and counter-claim, claiming £20 per ton, which was the price agreed to be paid on those conditions. To that the plaintiffs have replied that if the goods were carried they were not carried in the mode and manner agreed upon. In other words, the plaintiffs say that if the goods had been carried according to agreement they would have paid the £20 per ton, but that by reason of the goods not being so carried they were not worth that price to them. I think, according to *Cutter v. Powell*, 2 S. L. C., p. 1, and the notes thereto, that this is a good reply. Summons dismissed as to part 1, granted as to parts 2 and 3. Costs to be costs in the cause. Defendants to have leave to rejoin in any way they may be advised, and to amend their rejoinder, if necessary, without leave after the delivery of the particulars asked for.

Solicitors: For plaintiffs, *Bennett, Attenborough, Wilks*, and *Nunn*; for defendants, *Smale, Hamilton*, and *Wynne*.

PRACTICE COURT.

(Before His Honor Mr. Justice Williams.).

March 31.

Re THE SHIRE OF BOROONDARA *Ex parte* WADICK. *Local Government Act (No. 506), sec. 213, subsecs, 8, 17, 5, 218. Schedule 13—Act No. 786 Quashing byelaw—Carrying nightsoil through borough during certain hours prohibited—Such byelaw is not* ultra vires—*Such byelaw may be regarded as one made for purpose of regulating a particular kind of traffic.*

Order *nisi* to quash a bye-law made by the council of the Shire of Boroondara.

MR. HODGES moved the rule absolute; DR. MADDEN showed cause.

HIS HONOR said: This was an application made to me sitting as the Court on behalf of one Denis Wadick to quash a bye-law of the shire of Boroondara made under section 213 of The Local Government Act, on the ground that such bye-law is illegal and *ultra vires*. The bye-law attached prohibits nightsoil being carted or conveyed through the Shire of Boroondara except between the hours of twelve at midnight and four o'clock in the morning, and it is contended for the applicant that, whether such bye-law purports to be made under sub-section 8 or sub-section 17 of section 213 of the Act, it is so unreasonable as to render it *ultra vires* and illegal. I do not think the shire can support this bye-law as having been made under sub-section 8 for the reason that a shire has not, as it appears to me, power under the Act 38 Vict., No. 506 to make bye-laws for prohibiting the carriage or disposal of nightsoil (see section 218, and the thirteenth schedule to the Act). A shire may have power to make such a bye-law now under the Local Government Amendment Act; but the bye-law in this case was made, though not confirmed, before the Amending Act was passed. Apart from this, under sub-section 8, the power that is given, whether it be to boroughs or to boroughs and shires, is to suppress nuisances, and I am not clear that this would include making a bye-law which has the effect of legalising a nuisance (assuming the operation in question to be a nuisance) for a certain period of the 24 hours. I think, however, having regard to the decision of the Full Court in *Rider v. Phillips*, 10 V. L. R. (L.) 147, that the bye-law attacked may be made under sub-section 17. In other words, that it may be regarded as a bye-law made for the purpose of regulating a particular kind of traffic. It does not prohibit this traffic absolutely, nor in such a way as to render the performance of the work of removing nightsoil from the metropolis impossible. In other words it is quite feasible to carry on these operations, and at the same time comply with the provision of the bye-law. I do not, therefore, think it is unreasonable. It is true that the effect of it is to prohibit the carriage of nightsoil through the shire between certain hours, but, as was pointed out in *Rider v. Phillips*, "any regulation of traffic implies prohibition. To confine [traffic] to particular hours of the day is to prohibit [it] at other hours." I therefore, discharge the order *nisi* to quash, with costs.

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Solicitors: For Wadick, *Gillott* and *Snowden*; for Shire Council, *Atkyns*.

DIVORCE JURISDICTION.

(Before His Honor Mr. Justice Higinbotham).

FRENCH v. FRENCH. March 24.

Dissolution of marriage—Adultery of husband proved—Judicial separation—Fearless attitude of wife towards husband—Cruelty insufficient to entitle wife to divorce.

Suit for dissolution of marriage by wife against husband on the grounds of adultery and cruelty.

HIS HONOR said: In this case the adultery of the respondent has been proved, but I am not satisfied that the adultery of the husband has been coupled with such cruelty as, without adultery, would have entitled the wife to a divorce *a mensâ et thoro* under the law formerly existing in England. Under the Marriage and Matrimonial Causes Statute 1864, section 62, actual violence, such as to endanger life or safety, or a reasonable apprehension of such violence must be established to the satisfaction of the Court in addition to adultery in order to entitle a wife to a dissolution of the marriage contract (*Macartney v. Macartney*, 3 V. L. R. (J. P. & M.) 81; *Milford v. Milford* L. R. 1 P. & D. 295) The conduct of the respondent towards the petitioner for a long time was undoubtedly marked by great brutality of act and language, but his violence fell short of such actual bodily injury as endangered her health or safety, or inspired her with apprehensions. She appears to have maintained to the last a fearless attitude to her husband, and to have remonstrated freely with him for his gross misconduct. A judicial separation is the only relief to which the petitioner has established her claim.

Decree accordingly, with costs against the respondent.

CAMERON v. CAMERON. March 24.

Divorce—Regulations—Rules of Supreme Court 1884, *Order XXXVIII., rule* 10—*Affidavit note —The note required by rule* 10 *of Order XXXVIII. to be appended to every affidavit, must be added to all affidavits filed and used in the Divorce and Matrimonial Jurisdiction of the Supreme Court.*

An order *nisi* had been made for dissolution of marriage.

MR. FORLONGE now applied for a decree absolute.

HIS HONOR said: A renewed application has been made to me in this case for a decree absolute for a dissolution of marriage. By the rules and regulations of the Supreme Court in the Divorce and Matrimonial Jurisdiction, the rules in force in the Supreme Court under the Judicature Act 1883 are, as far as applicable, and where no provision is made by the first-mentioned rules and regulations adopted, and are in force in the Court in its Divorce and Matrimonial Causes Jurisdiction. The provisions of the rules in Order XXXVIII. are generally applicable, and, although a form of the affidavit to be used upon an application to make absolute a decree *nisi* for divorce, is provided in the schedule to the Divorce and Matrimonial regulations (No. 8) the note required by rule 10 of Order XXXVIII. to be appended to every affidavit must be added, I think, to all affidavits filed and used in this jurisdiction of the Court. At present, I refuse this application, but it may be renewed when the Court sits again to hear similar applications.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Molesworth).

March 17, 27.

RONAYNE v. ANSTEAD.

Administration under direction of Court—Marriage and Matrimonial Causes Statute Amendment 1884—*Retrospective operation of Acts—Construction of will—Appointment of guardian of infant Reference to chief clerk—Accounts—Maintenance of infant.*

The action was brought by Anna M. Willis Ronayne by her next friend, M. J. Cowley, to have the estate of one George Willis administered under the direction of the Court. The plaintiff was a daughter of Willis, and is now about 12 years of age. Willis by his will, made in 1877, appointed the plaintiff's mother to be her guardian; he left to the plaintiff one half of the income from his real estate till she should reach the age of 21, or marry before that age with the consent of her guardian; the other half of the income he left to a Mrs. Pope till the plaintiff came of age; when the plaintiff came of age she was to have all the property. In the event of the plaintiff and Mrs. Pope dying, the property was to go to a brother of the testator, and in the event of his death to his eldest son, born in Victoria (John Willis, who was made a defendant to the action, his father having died before George Willis). The executors of the will were Mr. Anstead and Mr. Pope. Mrs. Pope died in 1879, and since that time the executors have paid to a separate account the half of the income that had been formerly given to her. The plaintiff claimed that under the terms of the will she was entitled to this money; but it was submitted on behalf of John Willis that George Willis had died intestate as to this money, and that it should be distributed among his next-of-kin. Another question involved in the action was whether the executors should be held personally answerable for any loss that might be sustained in consequence of their having paid certain moneys on fixed deposit and current account to the Oriental Bank. The third question in the

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action was as to the appointment of a guardian for the plaintiff. Her mother died in June, 1884. On the 25th April, 1884, she had made a will appointing M. J. Cowley as her guardian. The executors would not recognise the appointment, and declined to pay him any allowance. The plaintiff's father was a Protestant, and her mother was a Roman Catholic, and her present guardian had placed her in a convent. The executors thought, as her father was a Protestant, she should be brought up in that religion, but it was pointed out by the plaintiff's counsel that her father had, by his will, appointed her mother, whom he knew to be a Roman Catholic, to be her guardian, and in his will he had directed that the plaintiff should be suitably educated, but said nothing about her religion. It was argued by plaintiff's counsel that under the Amended Marriage and Matrimonial Act (known as Shields' Act), passed in 1883, the mother had the power to appoint a guardian. The executors, however, contended that that act did not apply, inasmuch as the will was made before it came into force. It was reserved for the Royal assent in November, 1883; the Royal assent was not given till the 4th March, 1884, and the Act was not proclaimed in this country till the 7th June, 1884, while the will of plaintiff's mother was made in April, 1884.

MR. HIGGINS and MR. DUFFY appeared for the plaintiff; MR. WORTHINGTON for the executors, and MR. AGG for John Willis.

HIS HONOR said: The first question I have to deal with in this case is the construction of the will of Mr. George Willis. He left his real estate to Anstead and Pope, trustees, to pay one-half of the net rents to the guardian for the use of Anna M. Willis Ronayne, the plaintiff, for her use and benefit until she should attain 21 years of age, or marry under that age with the consent of her guardian, and to pay the other half to his niece, Mary Ann Pope, until the plaintiff should attain age or marry, but directed that if Mary Ann Pope should die before that time her representatives were to take nothing, and that if the plaintiff should die before that time all the real estate should be settled upon William Willis for life, with remainder on his decease to his eldest surviving child born in Victoria, and his heirs for ever. But if the plaintiff should attain 21, or marry then, the whole real estate to be settled upon her as directed. The facts which have occurred are, that Mary Ann Pope has died and the plaintiff lives still, under age and unmarried, so there is no direct disposal of half the rent. We may imagine that if the testator foresaw this he would have given the second half to the plaintiff, but I cannot act on that imagination. I will declare that the will did not dispose of them, and they should go as in case of intestacy according to our law to the next-of-kin of the deceased, and shall refer it to the chief clerk to inquire who the next-of-kin are. A question has been raised as to the responsibility of the trustees for a portion of these rents which were invested on deposit receipts with the Oriental Bank Corporation. I shall defer dealing with it till the next-of-kin are ascertained, and the extent of the loss. Mrs. Johanna O'Shea, the plaintiff's mother, made a will on April 5, 1884, appointing Mr. Michael John Cowley guardian of the infant plaintiff. She died June 2, 1884. The Act 787 was passed by the Parliament here before November 3, 1883, and then reserved for the Royal assent, which was given before April 5, for it was proclaimed here May 7, 1884; in fact, it was March 4. I have heard argument as to the efficacy of this appointment of guardian under the Act 787. It provided, section 1, that it should commence and come into operation on the 1st day of January, 1884. The 7th clause, with which I have to do, says that the mother of an illegitimate infant shall have power to appoint a guardian of such infant in the same manner, &c., as the father of a legitimate infant might. Reading these clauses together, I would say that the mother's will, executed at any time after January 1, 1884, would be effectual, subject, of course, to the Royal assent being obtained, acting retrospectively This Act confers power on the mother, a benefit on the daughter, no loss on anybody. In *Burn v. Carvallio*, 4 N. & M. 893, it was held that the Act 3 and 4 W. IV., c. 42, giving interest on damages recovered in an action upon which a writ of error was brought, did not authorise the allowance when the writ of error was tested on June 3, 1833, a day before that Act received the Royal assent (August 14, 1833), though it had a provision that it should commence and take effect on the 1st day of June, 1833. There the Act inflicted loss if it had a retrospective operation. A case of *Jamieson v. The Attorney-General*, A. & N. 375, supports this. In a case before my brother Higinbotham, *Carlyle v. Carlyle*, 10 V. L. R. 51, involving a question of the operation of the same Act 787, he held that the Act passed on the Royal assent being given, and that a suit commenced on May 2 was not pending at the passing of 787 within section 25, which says—"All suits commenced or pending at the passing of this Act shall not be affected thereby, but shall be taken, continued, and enforced as if this Act had not been passed." This opinion as to when an act passed would fortify the conclusion at which I have arrived from the 1st section. It is contrary to my opinion in *in re Turner*, 2 W. W. & A'B. (E.) 104 (18 and 19 Vict., cap. 55, section 3). I do not think it material to discuss when an act should be deemed passed. Courts of equity appointing guardians always regarded recommendations of putative parents, and an expression of Parliamentary opinion such as the Act 787 should strengthen that disposition, and if I were to give a direction in this case, I should

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obey it. Order that the estate be administered under the direction of the Court, declare that the clear profit of half the testator's real estate since the death of Mary Ann Pope were not disposed of by the said will, but for the present belong to the next-of-kin of the deceased, and should be accumulated by the trustees. Refer to the chief clerk to inquire who were the next-of-kin of the deceased at the time of his death, and who are now entitled under the above declaration, and that the said person, when ascertained, be served with notice of this judgment. Reserve the question of the responsibility of the defendants for the loss occasioned by the placing of the trust funds with the Oriental Bank Corporation. Declare that Michael John Cowley was effectually appointed guardian of the infant plaintiff by the will of Johanna O'Shea, and should be so treated by the trustees. Refer to the chief clerk to take the usual administration accounts of the real and personal estates of the deceased so far as any party may require, and also to inquire and report as to a proper maintenance for the infant plaintiff, past and future. Reserve further directions and costs, liberty to apply.

(Before His Honor Mr. Justice Molesworth.)

March 19, 30.

Re THE HOUSEHOLD CO-OPERATIVE SUPPLY CO. LIMITED.

Companies Statute (No. 190) sec. 121—Application ex parte *for delivery up by manager of books, &c., of company—Notice of application required by judge.*

Application on behalf of the liquidators of the Household Co-operative for an order directing the manager and the other officers of the company to deliver up the books and other property of the company.

MR. WORTHINGTON, in support: The application is made *ex parte* under section 121 of the Companies' Statute, No. 190. That section provides that where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court to determine any question arising in the matter of such winding up, or to exercise as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court, and the Court, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks fit; or it may make such other order or decree on such application as justice may require. Under the section the Court has, in two cases, made *ex parte* orders for payment by contributories of the amounts of contributions (*re The Ballarat Patent Fuel Company*, 2 W. W. & A'B. 272; *The Belmore Silver and Lead Company*, 2 V. R. 126). In this instance the shareholders had passed a resolution that the company should be wound up voluntarily, and had appointed two liquidators, but the manager, it was stated, refused to give them possession of the property.

HIS HONOR: Why should this order be made *ex parte?*

MR. WORTHINGTON: In the cases referred to the order on the contributories was made *ex parte*, and they were under the same section.

HIS HONOR: That is a different case. I shall have to consider whether I ought to make an *ex parte* order in this case, for complications might arise if an order was made without hearing the other parties interested.

HIS HONOR, in giving judgment on a subsequent day, said: In this case it is alleged that a resolution has been regularly made for winding up a company formed under the Act 190, and an application is made *ex parte* for an order that the manager should give up the papers of the company to the liquidators. To sustain the orders many questionable facts are to be established. By section 121 applications may be acceded to wholly or partially, and may be granted subject to such terms and conditions as the Court may think fit. To enable the Court to use these powers it should hear both sides. I was referred to *in re Ballarat Patent Fuel Company*, 2 W. W. & A'B. 272, in which I made an *ex parte* order for payment of calls. There the voluntary liquidation had been for some time in progress as showing its regularity. One schedule to the Act seemed to indicate that the particular order might be *ex parte*, and the order I did make was subject to application to vary or revoke. I shall require notice of the present application.

PRIVY COUNCIL APPEAL.

CLARK V. CLARK.

Suit by beneficiaries to set aside sale by executor of trust property to surviving partner—Misrepresentation alleged but not proved — Surviving partner appointed executor but renounced probate—Delay in bringing suit.

The following is the judgment of the Judicial Committee of the Privy Council on an appeal from a decision of the Supreme Court of this colony in the suit of *Clark v. Clark*, which was instituted by John G. Clark and Mrs. Jane Lawrence, the two youngest children of the late Mr. John Clark, tanner, to set aside a sale of property made to the defendant, David G. Clark.

Their Lordships said: In this case a bill was filed on the 15th August, 1881, to set aside a transaction which was entered into in the month of April, 1866. The plaintiffs, the now respondents, are the two youngest children of John Clark, viz.: John Guillan Clark, who attained 21 in October, 1869, and Jane, the wife of William Lawrence, who attained 21 in January, 1867. Mrs.

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Lawrence sues by her next friend, George Clark Allan, and her husband is a defendant. The principal defendant, the now appellant, is David Clark, the eldest son of John Clark. In 1864 John Clark had for some time been carrying on a tannery business near Melbourne. In July, 1864, he took his two sons David and George into partnership; and in January, 1866, on the sudden and simultaneous death of John and George, David became surviving partner. The impeached transaction is the purchase of the partnership assets and of the site of the business by David. The partnership was regulated by a deed made in April, 1865, of which the now material provisions were that the business should be carried on upon certain land belonging to John Clark; that so long as it was so carried on he should be entitled, in addition to his share in the profits, to receive out of the funds of the partnership by way of rent the sum of £150 a year; that John's stock-in-trade should be taken by the partnership at the price of £5,300, which should be considered as a loan and a first charge upon the partnership assets; that he should be entitled to receive out of the funds of the partnership, in addition to his share of the profits, interest at 7 per cent. on that sum, and that the net profits should be divided in the proportions of one-half to David and one-fourth to each of the others. By his will John Clark appointed David and a Mr. Balderson his executors and trustees and the guardians of his infant children, and he gave directions for the conversion of his real and personal estate and its equal division amongst his children. The surviving children were five in number, the three parties to this appeal, Ann Clark, and Agnes, the wife of G. L. Allan. When the news of John and George's deaths arrived, which happened on the 16th March, 1866, David had to consider his position; and he was advised by counsel on the 11th April, 1866, to the effect that if he wished to continue the business he had better not prove the will, that it would not be judicious for him to continue the business for the benefit of himself and family, and that arrangements should at once be made for winding up the business. Counsel then suggested that David might make a fair arrangement with the representatives of John and George for the purchase of their shares, but that in such case it was essential that he himself should not be one of those representatives. In point of fact David never did prove his his father's will. On the 1st May, 1866, he renounced by deed the office of trustee and executor, and all trusts, powers, and authorities whatsoever by the will expressed to be made or given to himself and Balderson. There is no allegation in the bill, and no suggestion in the evidence, that he ever acted as executor or guardian, or was looked upon by the others of the family as filling either of those characters. On the 17th May, 1866, Balderson alone proved John Clark's will. In August Ann Clark took out administration to George. On the 15th October Balderson and Ann executed a deed whereby they agreed to sell to David their interest in the partnership assets and the land whereon the business was conducted for the sum of £5,000. By the same instrument David gave security for the payment of the purchase money with interest to Balderson by 10 instalments, the last of which fell due on the 4th May, 1871. The stipulated payments were duly made by David to Balderson, and accounted for by Balderson to the beneficiaries. This is the transaction which the respondents have impeached, and which has been set aside by the decree of the Supreme Court now appealed from. It is impeached by the bill on the one ground of fraud and misrepresentation on the part of David, but that ground is not the only one on which the Court has rested its judgment. There are passages in this judgment from which it appears that the Court considered that, at least until his final renunciation, David must be treated as being an executor, and that he was also guardian to the respondents. And it has also been contended that the sale may be considered as one by an executor to himself, and as proceeding upon misrepresentation made by David, the surviving partner, to David the guardian of the infant legatees. If that were so, of course it could not stand when duly challenged by the beneficiaries. But David never was a guardian at all. And their lordships cannot agree that a sale is to be avoided merely because when entered upon the purchaser may at his option become the trustee of the property purchased, though in point of fact he never does become such. A man so placed, might possibly use his powers in such a way as to raise a case for setting aside the transaction, and whether David so acted is one of the questions to be decided. But that is a different thing altogether from the absolute disability attaching to one who would at the same moment be a vendor in trust for others, and a purchaser on his own behalf. No such case as that existed, nor was any such charged by the bill. The case made by the bill is to the following effect:—That at a family meeting held soon after the news of John Clark's death had arrived, David stated that John Clark's entire estate was not worth more than £5000, and offered to give the four others of the family £1000 each for the purchase of the whole estate, excepting a saddlery business; that, relying on the good faith of David, believing his statement as to value, being in great distress of mind, and anxious to avoid a family quarrel which David threatened to force on, Jane, who was then 20 years old, and Ann and Agnes who were adult, assented to David's proposal, and that John, who was only 17 years of age, was not consulted; that the three sisters expressed their desire to have independent legal advice, but did not persist in their wish because David expressed great indignation thereat, as an impeachment of his good

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faith; that David never stated his intention of disclaiming the trusts till he had procured the assent of his sisters to his proposal, but executed the deed of disclaimer immediately afterwards; that on the 15th day of October, 1866, an agreement was executed by Balderson of the first part, Ann Clark (who had become the legal personal representative of George) of the second part, and David of the third part, by virtue of which David claimed to have become absolutely entitled to the tannery and the land on which it stood, but that the plaintiffs were ignorant of its purport or effect; that though David's three sisters and brother knew, as a matter of repute, that a partnership existed between John, David, and George, they were in entire ignorance of its terms, and it was not until the month of April, 1881, or thereabouts, that by the accidental discovery of the indenture of partnership, they, for the first time learned how greatly they had been deceived by David in respect of the value of John's estate; that Ann Clark had discovered the deed in a box in her possession; and that the value of the land on which the tannery was conducted was £3700 at John Clark's death, whereas it was valued to David at £2000. The bill also complained of the sale to David of another piece of John's land at an undervalue, but that part of the case has been given up. Beyond the foregoing statements, nothing was alleged to show the fraud and misrepresentation of David, which was the sole equity of the bill. It will be seen that the case made by the bill rests upon David's statement as to the value of the estate, the belief of the others in that statement, his threatening to quarrel with them, his deterring them from taking legal advice, his reserve to them about disclaiming the trusts, their ignorance of the partnership deed, and the undervalue of the land. There is no charge that the partnership assets had in fact been undervalued, nor that David knew or believed their value to be more than he stated. On that point the plaintiffs only adduce the value given in the partnership deed. They do not allege that David concealed the deed. They do not suggest that there was any collusion between him and Balderson, or that Balderson was in any respect incompetent or neglectful of his duty. Balderson died in 1875, and his executor is a party to the suit, but no relief is prayed against him except the formal prayer for the administration of John Clark's estate. If then the case had been proved exactly according to the facts stated in the bill, it is at least doubtful whether the charges of fraud and misrepresentation against David could be sustained. But the case proved is a very different one. It appears that Balderson was an experienced man of business employed by John Clark, and much trusted by him and all his family. Allan, the husband of John Clark's daughter Agnes, is described by the plaintiff, Jane, as a first-class man of business and an honourable man. She adds that she and her sister Ann were on very good terms with him, saw him and his wife frequently, and consulted him as to John Clark's affairs. His relations with David appeared to have been rather unfriendly. It may be added that Ann and Jane lived in the house where both the tannery and the saddlery businesses were carried on. Such being the position of the family, the proposal that David should purchase the partnership business proceeded from Balderson. On what day this proposal was made does not appear. Indeed, the evidence is not clear as to the dates of the various steps in the negotiations, but they began sometime before the 15th April, and the terms were accepted before David's renunciation on the 1st May. On Balderson's proposal much bargaining took place between him and David as to price. Balderson employed one Dixon, who acted as a clerk in the tannery business, to make a valuation of the assets, which Dixon stated at £5240, and he took other steps to satisfy himself of their amount and value. As early as the 17th April he consulted his solicitor, Mr. Sedgefield, who continued to act for him until the completion of the sale. David consulted other advisers, first a Mr. Hanwell, whom he calls a law clerk, and afterwards Messrs. Bennett and Taylor, who took the opinion of counsel, which has been stated. Allan went to the tannery more than once to see things for himself. He denies this, but it is proved by other witnesses. He also consulted a solicitor, one Mr. Crisp, who, on the 24th April had an interview with Mr. Sedgefield, and fully discussed the matter. Allan now says Mr. Crisp acted only as a friend, but he was paid by Allan for his services, and was treated by Sedgefield as a solicitor. After carefully considering the state of the business, David made up his mind that £5000 was a full price to pay to his father's estate, and on that basis he offered to pay £1000 each to the other four children. Balderson tried to get better terms, and so did some of the family. Jane says they claimed £1600 each. Allan says that putting together John Clark's claim for the value of the original stock, which was fixed by the partnership deed at £5300, and the sum of £2500, at which John Clark's will valued the land, he thought his wife should get £1500, and held out for that sum for a considerable time. But David declared that his father had placed an extravagant value on the land, and that the partnerships had counter-claims against the £5300; and that his offer based on the value of £5000 must be taken as final. Balderson then had to consider the alternative of accepting David's offer, or winding up the business and carrying it into the market. Trade was very dull. Other tanneries were in the market. Balderson appears to have been afraid that the property would sell for very little, and moreover that, if David did not buy the estate would get involved in litigation, and, as he expressed himself to Allan, the property would be frittered away, and the girls would get nothing.

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In these circumstances Balderson became very anxious that David's offer should be accepted. But he would not take the responsibility of doing so on himself. If the adult members of the family agreed, he would prove the will and conclude the bargain. If they were adverse, he openly told them he would not involve himself in a family quarrel, but would renounce probate. David was equally open. If his offer was accepted he would renounce probate, as indeed he was advised that he must do; if not, he would act as executor, or at all events would hold himself open so to act. There was more than one family meeting held to discuss these matters, and at the last of these meetings, which probably took place on the 23rd April, the affair was brought to a head. It is clear that the family acted under Balderson's advice. Jane says, "Balderson advised us to accept the offer, because he believed, as David said, that it would realise no more." Ann says, "Balderson told me it was advisable to accept £1000, as he thought it was not a saleable business." And again, "I took the £1000 because Balderson advised, and David said we could get no more." And Allan says, "Balderson assured me that he believed the offer was full value. It was not at once accepted. I, for my wife, accepted 27th or 28th April. Balderson was constantly seeing me about it in the interval." There is no trace in the evidence of that reliance on David's assurances upon which the equity of the bill is built. The view taken of the transaction by their Lordships is this. It was one quite within the competence of Balderson as executor. It is not the less so because Balderson declined to clothe himself with the character of executor unless and until he could see a good chance of avoiding family quarrels and litigation. He need not have consulted the family, but as a prudent man he did so. David was not in any position of advantage except as surviving partner, which may have thrown upon him the obligation of giving full information. That Balderson, and Allan too, had free access to all available means of information is clear. It is equally clear that they were well advised, understood the bearings of the question, and struggled to enhance the price beyond what David would give. Nor can their Lordships find any trace of dishonesty or concealment on David's part from first to last. The cause was heard before Mr. Justice Molesworth, who dismissed the bill without costs, except as against Balderson's executor, whose costs the plaintiffs were ordered to pay. It would seem that the prayer for the administration of John Clark's estate was treated as only incidental to the recovery of assets for that estate by setting aside the sale to David. The plaintiffs then appealed to the Full Court, who set aside the sale as against them, directed accounts and administration of the partnership estate and of the estates of John and George Clark, and ordered David to pay all the costs, both of the original hearing and of the appeal. One of their reasons for makin such a decree has been already disposed of. Having stated what is the case made and the case proved their Lordships will advert briefly to the other reasons of the Supreme Court. The learned judges think that Balderson was placed in an unfair position by David's uncertainty whether or no he would renounce. But it is difficult to see how that circumstance placed Balderson at any disadvantage, and there is no evidence whatever to show that any embarrassment did, in fact, arise from it. It was very natural that David should make his renunciation dependent on the acceptance of his proposal, the more so because Balderson declined to prove if the proposal was rejected, and their Lordships cannot appreciate the objections which have been raised to his so acting. But then, the learned judges ask, was the sale fair? The contract, they say, may have been fair enough between Balderson and David, supposing them to have been dealing as strangers at arms' length, but unfair towards the testator's estate, treating both parties as representatives of the estate, and bound to protect the interests of the beneficiaries. And then they go on to show the imperfect nature of Dixon's valuation (exhibit H), and their reasons for thinking that more ought to have been coming to John Clark's estate from the partnership. Now, if the contract was fair as between Balderson and David, that is sufficient to maintain it, for it was within Balderson's competence, and David never held any fiduciary position. But their Lordships desire to add that, notwithstanding a very ingenious argument at the bar, they cannot find from any evidence before them reason to think that David gave any great undervalue for the assets, even considered on the basis of a book valuation, while there is strong reason to think that the family got at least as much as they might have got by the only possible alternative, viz., winding up and sale. It is possible and probable that David got a good bargain, which he turned to good account, especially as the course of trade turned strongly in his favour the next year; but it does not follow that the family got a bad bargain. Finally, the Court say, the sale could have been successfully challenged on the ground of a misrepresentation of value of the testator's estate made by both Balderson and David directly to the plaintiff Jane Lawrence, and indirectly to the plaintiff John Clark, and it would naturally be repeated to him by all his relatives who heard it, and was in effect repeated to him by Balderson when he received the securities on which he was told that his share, £1,000, was invested. Upon this it is sufficient to observe that from the filing of the bill down to the argument at this bar there has not been any suggestion or insinuation on the part of the plaintiffs that Balderson made any misrepresentation, or behaved otherwise than with honesty and with zeal for the family interest. Even if a

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more adverse view could be taken of the conduct of David or of Balderson, there would be much difficulty in giving relief to persons who have so long delayed to make their claims. The younger of the plaintiffs attained majority nearly twelve years before the bill was filed. He then received from Balderson what he knew was his share of the tannery business. The other plaintiff, who also duly received her share, was old enough to be present at the family discussions in 1866, and knew the whole story perfectly well. The only excuse given for action after such long delay is the discovery of the partnership deed. Supposing that suggestion to be well founded in fact, it is clear that the question how much would be coming to the estate of John Clark from the partnership must be determined by the state of the accounts in January, 1866, and not by the agreed amount at the date of the deed; and that the value of the land must be determined by the state of the market at the time of the sale, and not by the agreed rent stated in the deed. But their Lordships cannot believe in the truth of the suggestion. The partnership deed was referred to and partially read at one of the family meetings attended by the plaintiff Jane. Allan, who was consulted by Jane, founded his claim on the contents of the partnership deed. It was not retained by David or by Balderson. It was handed to Ann by Balderson during the negotiations, he telling her that it was of no use, in which he was not far wrong. Ann kept it in her desk. In cross-examination she says, "I knew it was there, but thought it was of no value. I looked among the papers, not particularly for a deed of partnership, but for what I then thought was a copy of a will. When I went lately I was looking for a deed of partnership. I remembered that I had such a thing. It was last year I got it, before August 1881." Their Lordships cannot doubt that the purport of the deed was well known to the whole family, except possibly the plaintiff John, or that he knew that the partnership business purchased by his brother was carried on under some arrangement, the nature of which he might have learned at any moment by asking a question of his sisters or of his brother-in-law. Even if the deed had turned out to have a direct and strong bearing on the question of value instead of a remote and weak one, its production under such circumstances as appear in this case would not justify the bringing of a suit after so long a lapse of time, during which the important testimony of Balderson was lost. In the opinion of their Lordships this suit is one which ought not to have been brought. It was rightly dismissed by Mr. Justice Molesworth. The Full Court ought to have dismissed the appeal with costs. Their Lordships will now humbly advise Her Majesty to make an order to that effect. The costs of this appeal must be paid by the respondent John Clark, and the next friend of the respondent, Jane Lawrence.

SUPREME COURT.

Sittings in Banco.

(Before their Honors Mr. Justice Molesworth, Mr Justice Williams, and Mr. Justice Holroyd).

April 1.

The Queen v. Alley *ex parte* M'Queen.

Informalities Amendment Act 1884 *(No.* 810) *sec.* 6—*A judge, sitting as a Court, has power to amend the minute of an order made by justices directing imprisonment as a means of enforcing the payment of a fine, they not having power to make such an order.*

This was an appeal against a decision made by Mr. Justice Higinbotham on an application made by George M'Queen, a wholesale grocer at Fitzroy, for a rule *nisi* to quash an order made against him by the justices at Fitzroy. M'Queen was summoned before the justices for two offences against section 4 of the Trade Marks Statute 1869. In the first case he was charged with placing spirits in a bottle bearing the trade mark of J. F. Martell and Co., and in the second case with placing spirits in bottles bearing the trade mark of J. D. Kuyper and Son. On each charge he was fined £100, to be levied by distress, and in default of distress to undergo 12 months' imprisonment, the liquor seized to be forfeited. Shortly after the order was made by the justices at Fitzroy, an application was made to Mr. Justice Higinbotham, sitting as the Court, to quash the order, on the ground that the justices had no power to direct imprisonment as a means of enforcing payment of the fine, but should have imposed either fine or imprisonment. Mr. Justice Higinbotham agreed with the view that the order of the justices was wrong, but held that under the Informalities Amendment Act No. 810 he had power to amend the minute of the order, and he therefore directed that in each case the order should be amended by striking out so much of it as directed 12 months' imprisonment in default of distress. Against this decision M'Queen appealed on the ground that the judge had no power to vary the order of the justices by making another conviction for them, and that he could, under the Amendment of Informalities Act, amend the formal order of the justices, so as to make it comply with the order as actually pronounced by the justices, and that he could not make an order different from that which they had pronounced. As there was some doubt whether under the Judicature Act and rules an appeal could be made from a decision of the kind, a rule *nisi* was obtained on behalf of the Queen in each case in the Full Court at the February Sittings of the Court, to quash the convictions, on the same grounds as those on which the applications were made to Mr. Justice Higinbotham. The appeal and the rules were heard together.

Sir Bryan O'Loghlen and Dr. M'Inerney

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appeared for M'Queen; MR. CHOMLEY appeared in support of the convictions.

A preliminary objection was taken by Mr. Chomley that there was no jurisdiction in the Full Court to entertain an appeal in a case of this kind, as the matter was a criminal, and not a civil or a mixed one; and that as to the rules *nisi* obtained from the Full Court to quash the conviction, they had been obtained too late, as by the Act 571 any application to quash a conviction or order must be made within a month of the decision of the justices, and in this case the application had been made to the Full Court more than a month after the justices had given their decision. These points were not decided, the Court reserving judgment on them till after the points raised by M'Queen as to the power of Mr. Justice Higinbotham to amend the order had been heard.

SIR BRYAN O'LOGHLEN then contended that Mr. Justice Higinbotham had no power to amend the minute of order as drawn up by the justices, as there was not a defect in form or substance within the 6th section of the Amendment of Informalities Act, but he was really giving a decision for the justices which they had not themselves given. It was also submitted that the amendment could not be made at that stage of the proceedings.

THE COURT held that his Honor had power to make the amendment that he had made, and dismissed the appeal and discharged the rule, without costs.

Exparte KIRK. April 2.

Justices of the Peace (Prohibition) 1877 (*No.* 571), *Sec.* 4—*Conviction—Where a conviction is bad on its face there is no discretion under sec.* 4 *of Act No.* 571 *to refuse an application to quash it.*

MR. LEON moved, by way of appeal from a decision of Mr. Justice Higinbotham, for a rule *nisi* to quash a conviction made by the justices at Kerang, in a complaint of *Lange v. Kirk.* The defendant Kirk was summoned for illegally impounding eight head of cattle, and he was fined. The conviction as drawn up stated that he was fined for "illegally impounding." An application was made to Mr. Justice Higinbotham on the 31st July last, for an order *nisi* calling on the complainant to show cause why the conviction should not be quashed, as it was bad on its face as not disclosing any offence, for it should have been stated that the impounding was "contrary to the provisions of the Pounds Statute, 1874." His Honor thought the conviction was bad in form, but he refused to grant an order to quash it, but offered to grant an order for prohibition so as to allow the conviction to be amended and be properly drawn up. The defendant Kirk appealed against that decision on the ground that the judge had no discretion in the matter, but was bound by the provisions of section 4 of the Act 571 to grant an order to quash a conviction that was bad on its face.

THE COURT held that where a conviction was bad on its face there was no discretion under sec. 4 of the Act 571 to refuse to grant an application to quash it. A rule *nisi* was, therefore, granted calling on the complainant to show cause why the conviction should not be quashed.

(Before Mr. Justice Molesworth, Mr. Justice Higinbotham, and Mr. Justice Holroyd).

KING v. WILKINSON. April 10.

Land Act 1869 (*No.* 360)—*Lessee—Where a lessee of Crown lands sub-lets such lands contrary to the conditions of his lease, such subletting renders the lease merely voidable and not void, and the sub-tenant is entitled to hold the land as against trespassers.*

This was a motion, on behalf of the defendant, to reverse or alter a judgment given by Mr. Justice Williams in this action. The plaintiff, Thomas King, sued the defendant, L. C. Wilkinson, to recover damages for trespass to plaintiff's land and for driving away his cattle. The land, which was situated near Healesville, was selected by a man named Langford, who afterwards obtained from the Crown a lease for it under the Land Act 1869. One of the conditions of the lease was that Langford should not assign or sub-let the property during the currency of the lease without consent of the Government, and that this consent should be registered. Langford, however, did sub-let to King. He afterwards mortgaged the property to Mr. Wilkinson, who, as the mortgage was not paid, sold the property to a person named Allard. Subsequently Allard resold to Wilkinson. It was alleged by the latter that King then agreed to give up to him possession of the property, and acting on that agreement Wilkinson had leased the property to a person named Isaac. King then refused to take his cattle from the property, whereupon Isaac, acting, as was alleged, under instructions from Wilkinson, drove the cattle away. The plaintiff alleged that some of the cattle had not been recovered, and he estimated his loss at £160 Mr. Justice Williams gave a verdict for the plaintiff for £90, stating that he had assessed the damages on the assumption that one or more of the cattle might afterwards be found. The defendant contended that the plaintiff was not entitled to maintain the action at all, as the sub-letting to him from Langford was illegal, and was, therefore, void; that the damages were excessive, inasmuch as it was not shown that there had been any specific act of trespass authorised by the defendant, which led to the loss of the cattle. It was also asked that the Court should receive additional affidavits to show that some of the cattle which the plaintiff said he had lost were at the time of the trial in his possession.

SIR BRYAN O'LOGHLEN appeared for the plaintiff; MR. MITCHELL for the defendant.

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THE COURT held that as to the sub-letting from Langford to King, it merely rendered the lease to him from the Crown voidable at the option of the Crown, but not void, and therefore King was entitled to hold the property as against trespassers. As to the new evidence which it was sought to give, that some of the cattle had not been lost, no reason had been given why that evidence should be received, and the judge in estimating the damages had expressly stated that he based his estimate on the assumption that some of the cattle might yet be found. As to the other point, there was evidence that Isaac had gone on the land under instructions from the defendant, and had proceeded to drive away the cattle; and for any cattle that had been lost in consequence of that the defendant was liable.

Motion to reverse or alter the judgment dismissed with costs.

SPLATT V. SPLATT. April 10.

Divorce—Alimony—Respondent out of jurisdiction —Where the Court has jurisdiction to entertain a petition for divorce whether the respondent is resident within the jurisdiction or not, it has also jurisdiction to make any other order incident to such petition.

This was an appeal from an order of Mr. Justice Williams, allowing the petitioner (Mrs. Splatt), a sum of £3 10s. per week for alimony pending the hearing of a suit. The petitioner (Mrs. Splatt) sought for a divorce from her husband on the grounds of adultery and cruelty. Pending the hearing of the suit she applied for alimony, and Mr. Justice Williams allowed her £3 10s. per week. The respondent contended that the Court had no power to make such an order, as he was living in New South Wales, out of the jurisdiction of the Court in this colony. The marriage was celebrated in this colony, but it was submitted that under the rules framed under the Marriage and Matrimonial Causes Act, the Court could not grant alimony *pendente lite* where the respondent did not live in Victoria. The rules provided that a respondent must file his answer to a petition for alimony within eight days after the petition was served personally upon him, and the petition might be heard on two days' notice being given to him. It was impossible to comply with those rules where the respondent did not live in the colony. There was also no power to enforce the order; it was not a debt which could be sued for in another country, nor was the order of the Court a judgment which could be enforced elsewhere. It was simply a personal order for payment of money, varying from day to day. For the petitioner, it was contended that, inasmuch as the Court had jurisdiction to entertain the original petition for divorce whether the respondent was resident here or elsewhere, it also had jurisdiction to make any other order which might be based on that petition. The respondent had also appeared, and answered to the petition for divorce. The order for payment of alimony was one which could be registered and enforced in another country. If there was any inconvenience caused by the rules requiring an answer to be given in eight days, the Court had power to extend the time for filing the answer, and could prevent any injustice being done.

DR. MADDEN, for petitioner; MR. TOPP, for respondent.

THE COURT held that as the statute gave jurisdiction to the Court in the main object of the suit, it had also jurisdiction in all collateral incidents of the suit, such as application for alimony. If any inconvenience was felt by a person residing out of the jurisdiction, in consequence of not being able in time to answer a petition for alimony, the Court had power to modify that inconvenience by extending the time for answering. Further, these orders were subject to be reviewed from time to time, and, therefore, no practical inconvenience could be done to anyone.

Appeal dismissed.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

April 15.

Re EDWARDS, *Ex parte* TOMLINS.

Insolvency Statute 1871 *(No.* 379) *Sec.* 113, *Sub-sec.* 2.—*Definition of the word "Servant"—A commission agent is not a servant within the meaning of sec.* 113, *sub-sec.* 2 *of Act No.* 379, *and is not entitled to prove as a preferential creditor.*

This was an appeal against a decision of Judge Noel as judge of the Court of Insolvency dismissing a motion by John James Tomlins to be admitted to prove on the estate of James and J. G. Edwards as a preferential creditor, for the sum of £50. It appeared from the evidence that the firm of J. and J. G. Edwards had carried on business in Richmond as tanners and leather dressers. In 1881 Tomlins entered into their employ as a commercial traveller and collector. He was to receive remuneration at the rate of 5 per cent. on all goods listed to him, no matter by whom they were sold. In November, 1883, the rate of percentage to be paid to him was reduced to 2½, and his duties as collector of debts were to cease. There had been no settling up of accounts between them, but in January, 1882, Tomlins applied to the firm for subsistence money, and they agreed to give him £2 per week. The balance that was due to him was to be settled up afterwards. The estate of the firm was sequestrated in 1884, and Tomlins applied to the Court to be admitted as a creditor for £193 13s. 7d. Of this sum £136 5s. was claimed to be due to him for the work he had done as traveller, etc. The balance of £57 8s. 7d. was for goods sold and delivered. Tomlins claimed that, as to the sum of £136 5s., he should be allowed to rank as a preferental creditor to the extent of £50. He based this claim on section

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113, sub-section 2, of the Insolvency Statute of 1871. That section provided that "the debts hereinafter mentioned shall be paid in priority to all other debts. . . . All wages or salary of any clerk or servant in the employment of the insolvent at the date of the order of sequestration not exceeding four months' wages or salary, and not exceeding £50; all wages of any labourer or workman in the employment of the insolvent at the date of the order of sequestration, and not exceeding four months' wages." Judge Noel held that Tomlins was not a clerk or a servant within the meaning of the Act, was, therefore, not entitled to any preference, and therefore admitted the claim only as an ordinary debt. Against this decision Mr. Tomlins appealed.

MR. ISAACS appeared for the appellant; MR. HODGES for the trustee.

MR. JUSTICE HIGINBOTHAM said that this was an appeal by a creditor, Mr. Tomlins, from a decision of the judge of the Court of Insolvency refusing to allow him to rank as a preferential creditor for the sum of £50. Mr. Tomlins was a creditor on the estate to the amount of £193 13s. 7d., of which he claimed that £136 5s. was due to him for salary as clerk or servant at the time of the sequestration of the estate, and that of this sum he was entitled to a preference for £50. On behalf of the trustee it was argued that the sum which he claimed as salary was due to him as a commission agent, and that the creditor did not come within the provisions of section 113, sub-section 2 of the Insolvency Statute, which gave a preference to a clerk or servant for four months' wages, or salary not exceeding £50. He (Mr. Justice Higinbotham) thought the judge of the Court of Insolvency was right. A person who sought to bring himself within the purview of the Act which gave him a preference over other creditors, was bound to prove to the satisfaction of the Court by clear proof that he came within the provisions of the Act. It lay upon him, therefore, to prove to the satisfaction of the trustee, and subsequently of the Court of Insolvency, that he was a clerk or servant within this section, and he had afterwards to show to this Court that the decision appealed from was clearly erroneous. In his case he did not think that the appellant had succeeded in doing so. The Court had to consider what was the meaning of the words "clerk or servant," and he thought they ought to receive their ordinary meaning. There was not so much difficulty about the word "clerk," He was a person engaged in writing or making calculations and entries. As regards the word "servant," generally speaking there were two elements for its definition—employment for a specific time, and employment by which exclusive services were to be given by an *employé* to his employer. Sometimes the one and sometimes the other of these two elements might be omitted; but an engagement which excluded both could not be called a contract of service. In this case the appellant was not under any obligation to render any service whatever to the firm, nor was he engaged for a specific time. He was to receive a commission on the goods he sold; and the engagement was one which either side might terminate at any time. Nor was there any obligation on the appellant to be subject to the orders of his employer. He did not receive payment according to any fixed rate. That appeared to be inconsistent with the ordinary meaning of the word servant. In the ordinary legal acceptation of the term "servant" in the civil jurisdiction, a servant meant a person who was engaged in the exclusive employment of another person, who was bound to comply with the orders of his employers for a period fixed by the express terms of the engagement or by usage. There had been cases in the criminal jurisdiction under the law of embezzlement, where it was held that a commission agent might be prosecuted for embezzlement as a servant, but that had been held under the language of the embezzlement acts, for in the proper acceptance of the term a commission agent was not a servant. It was held by Mr. Justice Molesworth *in re Murray*, 5 A. J. R. 3, under the section of the Insolvency Statute now under notice, that where a workman was not under stipulation to work exclusively for the insolvent, though in fact he worked for no other person, he had no preferrent claim, and he thought that decision was right. The appeal would be dismissed, with costs.

MR. JUSTICE WILLIAMS was of the same opinion. He based his decision on the language of the Act 379, sec. 113, sub-sec. 2. He thought the words "four months' wages" in that sub-section sounded, so to speak, in time. He did not think that the appellant was a clerk or a servant within the terms of the Act.

MR. JUSTICE HOLROYD concurred. He was very much inclined to think that a servant meant a domestic servant, or a menial servant. It was quite clear that the word was not used in the enlarged sense of the term, for then it would have included the word clerk. In this case he thought the evidence showed that the appellant was not a clerk or a servant to the insolvent, and he was therefore not entitled to any preference.

Appeal dismissed with costs.

O'HARA v. ROCHFORD. April 15.

County Court Statute 1869 (*No.* 345) *Sec.* 120.

Appeal—Re-hearing— When a case on appeal from the County Court is ordered to be re-heard, such re-hearing shall be taken before a judge of the Supreme Court without a jury—The re-hearing of a County Court action before a judge of the Supreme Court does not make it a Supreme Court action so as either to enlarge the jurisdiction as to amount or to affect the question of costs—The plaintiff is to set the cause down for

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re-hearing, and give notice of trial—Eddington and Carisbrook Estate Company, No Liability v. Ochiltree, 6 A. L. T. p. 189. *confirmed.*

This was an appeal from the County Court in an action brought by Dr. O'Hara, of Brighton, against Mrs. Rochford, the executrix of the will of her brother, William Hawthorn, to recover damages for attendances on Hawthorn after he had been wounded by his brother. A verdict had been given for the plaintiff, but the defendant appealed, and the appeal was allowed on the ground that Mrs. Rochford's husband should have been made a defendant to the action. A new trial being ordered before a judge of the Supreme Court; but the question was raised whether the trial should be before a judge alone, or before a judge with a jury. On that point the Court reserved judgment, which was now given.

MR. DUFFY appeared for the appellant; MR. HOOD for the respondent.

MR. JUSTICE HIGINBOTHAM said: In this case the appeal has already been allowed. By section 120 of the County Court Statute 1869 it is provided that the Supreme Court in deciding the matters of appeal from County Courts may "direct the cause to be re-heard before any judge of the Supreme Court, but shall not in any case remit the cause for re-hearing before the judge of the Court from which such appeal shall have been brought." We are called upon in the present case to re-consider the meaning and legal effect of these words, and to determine whether a cause directed on appeal to be re-heard before a judge of the Supreme Court sitting alone or assisted by a jury. The first-reported decision in which this question was considered is *Morley v. Rice*, April, 1872, reported in 3 A. J. R., p. 30. The Court in that case decided that the cause should be re-heard before a judge of the Supreme Court without a jury. Subsequently the practice became unsettled, and different judges appear to have taken different views of the meaning of the Act. The next reported case is that of *Nolan v. Connell*, March 28, 1874, 5 A. J. R., pp. 20 and 21, where the Court ordered that the case should be tried before a judge of the Supreme Court without a jury. A judge in chambers, however, set aside the notice of trial given in accordance with the order of the Court, on the ground that the notice did not mention a jury, or the number of the jury. The cause was notwithstanding put in the list for trial at the next sittings, and another judge refused to try it. The Court, when the order was again brought before it on June 25, 1874, appears to have adhered to its original view, and directed that notice of trial as before, *i.e.*, without a jury, should be given. See *Nolan v. Connell*, 5 A. J. R., p. 70. The next and last reported case on the subject is *The Queen Insurance Co. v. King*, on September 22, 1874, 5 A. J. R., p. 124. In that case the cause was re-heard before a judge of the Supreme Court without a jury, and the finding of the judge, which was in favor of the plaintiff, with damages, was enforced by a rule of Court absolute in the first instance to make the finding of the learned judge a rule of Court. In all these cases the expressed view of this Court was uniformly favorable to such an interpretation of the statute as would at least authorise, if it did not require, that the re-hearing after appeal should be by a judge of the Supreme Court without a jury; but a different practice afterwards grew up, and from the year 1874 down to the present time, without, as far as we are aware, a single exception, all causes ordered on appeal from County Courts to be re-heard before a judge of the Supreme Court, have been, in fact, re-tried before a judge and jury. We are of opinion that the existing practice is not warranted by the language of the Act of Parliament, and has not been authorised by any reported decision of this Court. We think, in accordance with the decisions above cited that the Legislature plainly intended that a judge of the Supreme Court sitting alone, without a jury, should re-hear and determine all questions of law and fact arising in a cause ordered on appeal to be re-heard, whether the cause was tried in the first instance by a judge without a jury or by a judge and a jury. It has been suggested that a re-hearing by another County Court judge is not forbidden by the terms of the 120th section. But it has not been expressly permitted. The re-hearing of a cause by another Court, is, like an appeal, the creature of statute law, and it never lies except where it is given by express terms (*Attorney-General v. Sillem*, 10 H. L. C., p. 704, 33 L. J. (E.), 209; *R. v. Hanson*, 4 B and Ald., p. 521.) The effect of a return to the old practice, which we now make, will not, of course, extend beyond substituting a judge alone, for a judge and a jury. The action will still be a County Court action, and the re-hearing of it before a judge alone will not make it a Supreme Court action, so as either to enlarge the jurisdiction as to amount (*Berstein v. Blashki*, 3 V. L. R. (L.), p. 145, or to affect the question of costs (*Randall v. Smith*, 3 V. L. R. (L.) p. 56). The plaintiff will, as heretofore, set down the cause for re-hearing, and give notice of trial. The change in these respects which the new rules have made with regard to actions in the Supreme Court do not affect a County Court action re-heard before a judge of the Supreme Court. An opinion to this effect, intimated in Chambers in the case of *Eddington v. Carisbrook Estate Company No Liability*, 6 A. L. T., p. 189, is now confirmed by the Court.

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IN CHAMBERS.

(Before His Honor Mr. Justice Holroyd.)

April 18.

LEWIS AND ANOTHER v. KLAPPROTH.

Rules of Supreme Court 1884—*Orders LVIII., rr.* 2, 3, 15; *LXIV., rr.* 2, 3, 5*—*Notice of appeal—Holiday—Where the last day of the notice of appeal required by Order LVIII., rule* 3, *falls on a holiday such notice is good.*

Application on behalf of the defendant calling upon the plaintiffs to show cause why the notice of motion given herein on the 25th March, 1885, by the plaintiffs, whereby the plaintiffs gave notice that the Full Court will be moved on the 4th April 1885, or so soon thereafter as counsel for the plaintiffs can be heard, that the judgment of the Supreme Court made herein, and delivered on the 25th February, 1885, may be reversed, and that it may be ordered that judgment herein be entered for the plaintiffs, and that the costs of this appeal, and in the Court below may be paid by the defendant to the plaintiff, be set aside, and the said motion struck out of list on the ground that the said 4th April, 1885, is a day on which, by the rules of this Court, the Court does not and did not sit, the said day being the Saturday following Good Friday.

MR. GOLDSMITH in support; MR. BRYANT to oppose.

HIS HONOR said: The judgment in this case was given on the 25th February, 1885, for the defendant, without costs. On the 25th March the plaintiffs delivered their notice of appeal as for the 4th April, this being the ten days' notice reckoning from the 25th March, required by Order LVIII., rule 3. By Order LVIII., rule 15, a month's time is allowed for appealing. The 4th April fell on the Saturday after Good Friday. This summons was taken out on behalf of the defendant, to set aside the notice of appeal, and to strike the motion out of the list. I have considerable doubt whether I, sitting as a judge, have jurisdiction to entertain this matter, and I do so only on the express wish of both parties. Order LVIII., rule 2, provides that any notice of appeal may be amended at any time, as the Full Court may think fit. Order LXIV., rule 2, provides that where any limited time less than six days from or after any date or event is appointed or allowed for doing any act, or taking any proceedings, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time. Rule 3 provides that where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open. Rule 5* of the same Order provides that from the 20th December to the 1st February no ordinary proceedings shall be carried on in the said Court, nor shall any time run for the return of any process or doing any act during that period, etc. There is not a single rule which says that if the last day for serving a notice of appeal falls on a holiday, that any other day shall be substituted for it. If the Court does not sit, then counsel cannot be heard, The rule says that the notice shall be a ten days' notice, and they do not provide for any other day if that day should fall on a holiday. I dismiss the summons with costs to be taxed. I certify for counsel.

Solicitors: For plaintiffs, *Lewis*; For defendant. *Cohen.*

April 25, 30.

AITKEN v. ETTERSHANK.

Rules of Supreme Court 1884, *Order XXXI., r.* 14. *Production of documents—Mortgagor and mortgagee—Muniments of title—The mortgagor cannot ask the mortgagee to produce the title deeds until he has paid principal, interest and costs, unless under special circumstances—Before a judge can decide in an application of this nature whether the case is a fit one in which to order the production of the muniments of title both parties should have pleaded.*

Application under Order XXXI., rule 14, on behalf of the plaintiff for an order to compel the defendants to produce certain documents.

MR. BARRETT, in support: The plaintiff applied under Order XXXI., rule 12, for discovery of documents relating to the matters in question in this action, and the defendant has objected to produce some of the documents on the ground that they are muniments of title. To enable the defendant to uphold this objection he must show that the documents concerning which production is asked, are documents which relate solely to the defendant's title. The affidavits state that it is impossible to prepare a statement of claim, unless these documents are produced.

It was contended on behalf of the defendant that the action was substantially one by a mortgagor against a mortgagee. The mortgagor wants the mortgagee to produce the title deeds, but the mortgagee has a right to refuse to produce such deeds until he is paid off.

HIS HONOR said: In this case an order was made directing the defendant to make discovery on oath of the documents which are in his possession or power, relating to the matters endorsed on the writ. The defendant has made an affidavit, by which he shows that he has a great number of documents in his possession, some of which he objects to produce, on the ground that they are muniments of title. A great number of affidavits have been filed, from which it appears that the plaintiff is the mortgagor and the defendant is the mortgagee of certain property. Some of this property

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has been seized, and the claim indorsed, on the writ is amongst others for damages for trespass. This application is for inspection of the mortgage deed, and of others which may be called securities. No statement of claim has been delivered. The defendant denies the plaintiff's statement, but submits to be redeemed I doubt very much whether, under any circumstances the plaintiff is entitled to the production of the title deeds before the hearing. In the case of *Chichester v. The Marquis of Donegal* (L. R. 5 Ch. Ap. 497) James, V. C., ordered the production of a mortgage deed, after answer, and before hearing under peculiar circumstances; he was overruled, but he was not overruled on this important point, viz., that one of the rights of a mortgagee is that the mortgagor cannot ask the mortgagee to produce the title deeds until he has paid the principal, interest, and costs (*Freeman v. Butler*, 9 L. T. N. S. 405). In ordinary cases the title deeds must be produced at the hearing, but not before (*Beaumont v. Foster*). It is admitted that the deeds do not contain the contract which they are said to have contained. From the affidavits I think that the plaintiff can prepare his statement of claim without these deeds. I think that, before I could decide on an application of this kind I ought to know how the pleadings are really framed I ought not only to see the statement of claim, but also the defence, so that I can see how much is admitted. I refuse this application with costs, on the grounds that it is premature, as no pleadings have been delivered, and that it is contrary to all rules.

Solicitors: For plaintiff, *Barrett*; for defendant, *Crisp, Lewis* and *Hedderwick*.

(Before His Honor Mr. Justice Molesworth.)

April 27.

HAYES V. WILSON AND ANOTHER.

Rules of Supreme Court 1884, *Orders LIV. r.* 1; *LV., r.* 69—*The opinion of the judge as prescribed by Order LV., r.* 69, *can only be taken on summons.*

During the prosecution in Chambers before the chief clerk, of the proceedings under the decree in this cause, which was being carried on according to the ordinary course of the Court, the defendants, Wilson and Broomfield, gave notice of their intention to take the opinion of the judge on certain points in pursuance of Order LV., rule 69, and upon that order obtained an appointment from the judge's associate to be heard before the judge in Chambers, and served the order and appointment on the other parties. When the matter came on it was objected to on behalf of the plaintiff on the ground of irregularity, as a summons should have been taken out under Order LIV., rule 1.

MR. WATERHOUSE, on behalf of the defendants, submitted that the proceedings were regular, and cited Daniell's Chancery Practice, p. 961; *Upton v. Brown*, 20 C. D. 731; and sec. 49 of the Judicature Act 1883.

HIS HONOR said: I am of opinion that the application should have been made by summons pursuant to Order LIV., rule 1. I refuse the application. Costs to be plaintiff's costs in the cause. The applicants to abide their own costs.

Solicitors: For applicants, *Pavey* and *Wilson*; for plaintiffs, *Crisp, Lewis*, and *Hedderwick*.

(Before His Honor Mr. Justice Holroyd.)

HESELTON V. CROZIER. April 30.

Summons in Chambers—Where one party has taken out a summons in general terms, the other party is justified in appearing on the return of such summons, though he makes no objection to the granting of the application made on such return.

Application on behalf of plaintiff that the memorandum of the close of the pleadings filed herein, and the notice of trial given thereupon be set aside, and that the plaintiff be at liberty to file another memorandum of the close of the pleadings, or that such other order may be made as to the judge may seem just.

It was stated on behalf of the plaintiff that notice of the close of the pleading had by mistake been given on the 16th April, but that the joinder of issued had not been delivered by the defendant until the 17th April, so that the notice had been made one day too soon. It was now sought to file another notice.

MR. BARRETT, to oppose: I make no objection to this application; it is only a question of costs.

HIS HONOR: If you do not object, why do you appear?

MR. BARRETT: The form of the summons is too wide. If the plaintiff had asked merely for leave to file a fresh notice of the close of the pleadings there would have been no need to appear, but he has asked for that or "such other order as to the judge may seem just." Under the last part of the summons the plaintiff might have asked for anything, *e.g.*, that the defendant should take short notice of trial, and I submit that it was necessary for the defendant to appear to protect his own interests.

HIS HONOR: I should be disposed to grant this summons without costs, but the plaintiff has taken out his summons in such general terms that I think the defendant was justified in appearing. I allow this summons with costs to the defendant, which I fix by consent at two guineas.

Solicitors: For plaintiff, *Pentland* and *Roberts*; for defendant, *Fink*.

(Before His Honor Mr. Justice Higinbotham.)

HEDRICK V. PURSE AND ANOTHER. May 1.

Rules of Supreme Court 1884, *Order XIX., rr.* 7, 13, 15—*Particulars—Libel—Plea of non-admission—Effect of such plea—Plea of justification.*

Application on behalf of the plaintiff to set aside or amend the second defence of the defendant, or to

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give further particulars thereof, and also for further particulars of the sixth defence on the grounds that further particulars are necessary, and the second and sixth defences are embarrassing without such particulars.

MR. FORLONGE, in support: The action is one for libel. The defendants have pleaded amongst others. 2. They do not admit that the alleged libel was printed and published either falsely or maliciously. 6. The defendants say that the alleged libel is true in substance and in fact.

The second paragraph sets up priviledge, and the plaintiff is entitled to know the particulars of the privilege. The form in which this paragraph is pleaded is likely to take the plaintiff by surprise, and he is entitled to particulars, (Order XIX., rule 15.)

The sixth paragraph is a plea of justification and the plaintiff is entitled to know the grounds on which the defendants are going to rely.

DR MADDEN, to oppose: Under the old system, each plea was a separate defence; but now you look at the whole statement. If this libel is looked at it will be seen that it is a report of Government officials. In the statement of claim sets out the report of these Government officials; only a part of which refers to the plaintiff. He is not to compel us to set out the whole of the matter so as to compel the defendants to give particulars of matters which do not relate to him. If the defendants were to give particulars they could do more than give the plaintiff the official report which he can get for himself. The plaintiff cannot be embarrassed if he knows all that the defendants know.

HIS HONOR said: The second paragraph of the statement of defence is in accordance with Order XIX., rule 13, which provides that there may be a withholding of admission; the effect of such withholding of admission being to compel the other side to prove the facts which they have set out in their pleading. With regard to the 6th paragraph of the statement of defence, I think that it is too full. The whole report of the officials is given, only a part of which refers to the plaintiff. I think, therefore, that this paragraph should be limited to the part that relates to the plaintiff, and should be as follows:—"The defendant says that the alleged libel *in so far as it relates to the plaintiff* is true in substance and in fact." If the defendants are willing they can limit this paragraph in the way I have pointed out. If the paragraph be so amended, I order that particulars of the justification be given as to so much as relates to the plaintiff. If the defendants do not amend, they must give particulars with regard to the whole libel. Costs to be costs in the cause. I certify for counsel.

DR. MADDEN stated that the defendants would elect to amend.

Solicitors: For plaintiff, *Kidston*; for defendant, *Davies, Price*, and *Wighton*.

SITTINGS IN BANCO.

(Before Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

April 15.

BAULD V. WILLIAMS AND OTHERS.

Malicious prosecution—In an action for malicious prosecution the plaintiff has to show that the defendant had no reasonable and probable cause for prosecuting the plaintiff.

Appeal from a decision of the judge of the County Court, Melbourne. The action was brought by the plaintiff against the defendants, who acted as committee of the sports at Numurkah, on Easter Monday, 1884. He claimed damages for malicious prosecution, on the ground that the defendants had maliciously, and without reasonable and probable cause, caused the plaintiff to be arrested and prosecuted for wilful trespass, and refusing to leave the ground when requested so to do. It appeared from the evidence that the committee sold by auction the right to erect booths on the ground for the sale of liquor. Mrs. Bauld, the plaintiff's wife, purchased the right to one booth, and there was some dispute as to whether the auctioneer sold her booth No. 1 or lot No. 1. The booth was placed, in the early part of the day on which the sports took place, near the winning post, but at a later period of the day the committee removed the winning post to another part of the ground, and the greater portion of the public went to that part of the course. The plaintiff, who was managing the booth for his wife, removed the booth to near the new winning post. The committee directed him to go back to the place where the booth had been first erected. He refused to comply with their request, and was then given into custody, but was afterwards released on bail. He was prosecuted a few days afterwards in the local police court for wilfully trespassing on the ground, but was acquitted, and he then brought the action to recover damages for malicious prosecution. The judge non-suited the plaintiff, who now appealed.

MR. PURVES, MR. TAYLOR, and MR. BARRETT appeared for the appellant; DR. MADDEN, MR. HOOD, and MR. JOHNSTON for the respondents.

THE COURT was of opinion that as the plaintiff had placed his booth at one part of the course in the early part of the day, he had no right afterwards to remove it to another part, and that the plaintiff had not shown that the defendants in prosecuting him had no reasonable and probable cause for doing so. There was no evidence that the defendants before giving the plaintiff into custody believed that the plaintiff was acting under a fair and reasonable supposition that he had a right to remain on the ground after being told to go away. The appeal was therefore disallowed with costs. The appeal case had previously been before the Court, but had been remitted to the judge of the County Court to be re-stated, and it

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was directed that each party should abide their costs of these proceedings.

REG. v. GIBSON. April 15.

Criminal Law and Practice Statute 1864 *(No.* 233*) sec.* 48—*Where a prisoner is charged with unlawfully and indecently assaulting a girl under twelve years of age, ignorance of such girl's age is no excuse.*

Special case stated by Mr. Justice Williams on the trial of the defendant for having unlawfully and indecently assaulted a girl under 12 years of age. The offence was committed in a house at South Melbourne, which the prisoner had entered one night while he was drunk, believing it to be a house of ill-fame. The jury found the prisoner guilty, but a point was reserved for the Full Court as to whether, under the circumstances, he could be found guilty of assault.

MR CHOMLEY appeared for the Crown; SIR BRYAN O'LOGHLEN for the prisoner.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said: The prisoner was presented against and was found guilty, under section 48 of the Criminal Law and Practice Statute 1864, of having unlawfully and indecently assaulted a girl under 12 years of age. The jury found specially that the prisoner, while stupefied with drink, had entered in the dark, and for an immoral purpose, the house where the girl was, believing it to be a house of ill-fame. It has not been found by the jury that the prisoner had reasonable grounds for that belief. Upon the facts, as they appear in the case, we should say that he had not reasonable grounds. As the prisoner was not so drunk as not to know what he was about, his stupefied condition through drink cannot be regarded as affecting his intention, or altering the legal character of his act. But as our brother, Williams, J., has informed us that he has little doubt that the jury would have found that the prisoner had reasonable grounds for his belief, and that, if anything should turn upon that point, a new trial ought, in his opinion, to be granted, we will assume in the consideration of this case that the prisoner had reasonable grounds. The question which we have to determine is whether such belief of the prisoner, and his ignorance that the person whom he assaulted was, in fact, a girl under 12 years of age, is, in law, an answer to the charge. For the purpose of determining this question we have to ascertain what was the intention of the Legislature in making this enactment. Section 48 is one of 11 sections (sections 42 to 52) dealing with offences against women. Some of these sections expressly make the intent an element of the offence (sections 43, 46, 50, 51). Other sections, including section 48, omit the intent as an element in the definition of the offence. All of them omit knowledge as a necessary ingredient of the offence defined, although, as regards some of them, *i.e.*, abusing or attempting or assaulting with intent to abuse a girl under the age of 10 years, abusing or attempting to abuse a girl above the age of 10 years and under the age of 12 years, and unlawfully and indecently assaulting a girl under 12 years of age, age is an essential element, and it is evident that in a large number of cases an accused person might have reasonable or plausible grounds for believing that the girl abused or assaulted was beyond the age protected by the statute. Can it be supposed to have been the intention of the Legislature that the existence or non-existence of the crime should depend upon an accused person's knowledge, or his reasonable or plausible grounds of belief respecting the real age of the child? We do not think that it can. The language of the judgment of the majority of the Court in *Reg. v. Prince*, L. R. 2 C. C. R., at p. 171, in regard to the offences specified in sections 45 and 50, may, we think, be adopted and applied with slight alteration to an offence charged under section 48. "It seems to us that the intention of the Legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. A man who has connection with a child, relying on her consent, does it at is peril, if she is below the statutable age." But it is said that this view is opposed to the fundamental principle of the criminal law of England *actus non facit reum nisi mens sit rea*, and that where there is ignorance or mistake in fact, and consequently an absence of a vicious will, there can be no conviction for a crime. But this maxim requires that its terms should be explained and even largely modified before it can be applied in practice to the interpretation of the criminal law as it exists at the present day. Brett, J., who was the sole dissentient in the case of *Reg. v. Prince*, L. R. 2 C. C. R., observes at p. 169:—"What is the true meaning of the phrase *mens rea?* I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime, if the result was as he anticipated, but in which the result may not improbably end by placing the offence within a more serious class of crime—as if a man strikes with a dangerous weapon with intent to do grievous bodily harm, and kills, the result makes the crime murder. The prisoner has run the risk. So, if a prisoner do the prohibited acts without caring to consider what the truth as to facts is—as if a prisoner were to abduct a girl under 16 without caring to consider whether she was in truth under 16, he runs the risk. So if he, without abduction, defiles a girl who is, in fact, under 10 years old, with a belief that she is between 10 and 12, if the facts were as he believed, he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime." But the majority of the judges in the same case inclined to the opinion that the language

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of the enactment in each case must be considered, for the purpose of determining whether the Legislature intended that "knowingly" should or should not form a part of the definition of the prohibited act, and that ignorance of the facts essential to constitute the crime is not a defence where the thing prohibited is wrong in itself, though not criminal, and knowledge has not been made an express condition by the Legislature. The case of *Reg v. Prince*, L. R. 2 C. C. R., p. 154, which was decided upon this view, has been followed by two cases which confirm and even extend it. In *Reg. v. Bishop*, 5 Q. B. D., p. 259, the defendant was convicted under 8 and 9 Vict., c. 100, sec. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under any Act of Parliament, and though it was specially found that the defendant honestly and on reasonable grounds believed that they were not lunatic, such belief was held to be immaterial, and the conviction was affirmed. In the more recent case of *Cundy v. Le Cocq*, 13 Q. B. D., p. 207, it was held that the prohibition in the Licensing Act 1872, section 13, making it an offence to sell any intoxicating liquor to a drunken person, was an absolute prohibition, and that the knowledge of the condition of the person served with liquor was not necessary to constitute an offence. Stephen, J., who had not been one of the adjudicating judges in *Reg. v. Prince*, 2 C. C. R., p. 154, observed in this last case:—"I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a *bonâ-fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for the mitigation of the penalties that may be imposed. I am led to that conclusion, both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head 'Offences against Public Order.' . . . Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind, but I do not think that that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application, but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg. v. Prince*, L. R. 2 C. C. R., p. 154, and *Reg. v. Bishop*, 5 Q. B. D., p. 259, to apply the maxim generally to all statutes. The substance of all the reported cases is that it is necessary to look at the object of each act that is under consideration, to see whether and how far knowledge is of the essence of the offence created." The rule of law as now settled by these authorities has been formulated by the same learned person with reasonable precision in the following terms. See Stephens Digest of the Criminal Law article 34, p. 20: "Ignorance of Fact.—An alleged offender is in general deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. Provided that when an offence is so defined by statute that the act of the offender is not a crime, unless some independent fact co-exists with it, the Court must decide whether it was the intention of the Legislature that the person doing the forbidden act should do it at his peril, or that his ignorance as to the existence of the independent fact, or his mistaken belief in good faith and on reasonable grounds that it did not exist, should excuse him. Provided also that voluntary or negligent ignorance of any such fact is no excuse for any such offence." The defendant in the present case has committed an act forbidden by the Legislature. We do not think that the Legislature intended that *bonâ fide* ignorance of the age of a girl in this or in any of the other cases coming under the same head should be an excuse. We are therefore of opinion that the conviction was right, notwithstanding the belief under which the jury have found that the defendant committed the act, and even if it be assumed that that belief rested on reasonable grounds. We think that the conviction should be affirmed.

PROBATE JURISDICTION.

(Before His Honor Mr. Justice Molesworth.)

IN THE WILL OF SINNETT. April 30.

Will—Executors—Commission—The first duty of executors is to realise the estate, and not to continue a business. The Court will not make an order for commission where the executors have gone beyond the simple performance of their duties.

Application on behalf of the executors for commission.

MR. WOOLF, in support: The affidavit of the executors shows that the applicants are the executors of Sinnett, who died on the 30th January, 1883, leaving a will bearing date the 6th November, 1882, and that probate was granted to them on the 19th April, 1883; that at the time of the testator's death the principal asset in his estate was a half share in a quartz claim, which if it had been then sold would have realised a very small sum in consequence of there being at that time a stand-still in the mining market; that the executors accordingly carried the claim on in conjunction with the owner of the other half share, with the result that they have placed to the credit of the estate the sum of over £4600, derived solely from the gold returns of the said claim; that in order to carry on such mining operations it was necessary for them to employ miners to supervise the same and for one of them to attend at the claim very frequently, and also to attend there when the crushings and washings up to place in

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order to take possession of the gold and to keep separate accounts in connection with the working of the claim; that part of the estate of the testator cousists of a selection of land containing 160 acres held under a licence from the Crown, but as they cannot sell the same they are carrying it on for the purpose of obtaining the Crown lease for the same when they will be able to sell it and realise a considerable sum. Then follows an enumeration of the children of the testators, and what provision has been made them, and a statement that the applicants have not taken anything from the funds of the estate for their expenses in connection with their administration of it.

His Honor said: The executors in this case have embarked in a mining speculation, and they seem to have done so for the benefit of the estate, I do not say that they have not done very well for the estate in carrying on this business, but the first duty of executors is to realise the estate and not to continue a business, and I do not choose to make orders where the executors have gone beyond the simple performance of their duties.

Proctor: *Woolf.*

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Molesworth.)

Robertson v. Corbett. March 31.

Will—Construction—A testator directed his trustees to pay to his widow an annuity of £4000 till his youngest child attained the age of 21 years, and when the event happened the widow was to be paid a sum of £6000, and the annuity was to be reduced to £2000. Each of his daughters was to receive £12,000 and his son was left the residuary legatee. Held *that the trustees mightset apart sums of £12,000 to meet the legacies, and if they elected so to do, that they might withdraw them for the purpose of paying the annuity, that they could not pay the legacies till the youngest child had attained the age of 21 years, and that the annuities to the widow were payable in priority to the legacies to the daughters.* Held *also, that the gift to the son of the residuary estate postponed him to both the payment of the annuities and the legacies.*

This was an action to obtain the opinion of the Court as to the construction of the will of the late Mr. John Robertson, of Colac. The plaintiffs were three of the daughters of the testator, who are under age, and who sued by their next friend. The defendants are the widow of the testator, the trustees of his will, and his son, Edward Quartus Robertson. Mr. Robertson, by his will, directed that his trustees should pay to his widow an annuity of £4000 till his youngest child attained the age of 21. When that event happened the widow was to be paid a sum of £6000, and the annuity was to be reduced to £2000. Each of his daughters was to receive £12,000, and the balance was to go to his son, E. Q. Robertson. Mr. Robertson died in 1875, and his widow some years afterwards married again. The estate of Mr. Robertson was not sufficient to pay the annuities and all the legacies, and this suit was brought on behalf of the daughters, who claimed that all the legacies should be reduced in proportion. It was contended, on behalf of the widow, that she was entitled to her annuity in preference to any other payments. It was said that if all the claims were paid there would be no residuary estate left for E. Q. Robertson, and the widow therefore insisted on her claim in order that she might make some provision for him.

Mr. Worthington and Mr. Weigall appeared for the plaintiffs; Mr. Webb, Q.C., and Mr. Topp for the widow; Mr. A'Beckett and Mr. Goldsmith for the trustees; Mr. Higgins for the defendant, E. Q, Robertson.

His Honor, in giving judgment, said: I have felt considerable doubt and difficulty in this case as to the application of the general rule of Courts of Equity, that a testator should be deemed to contemplate a sufficiency of his assets to pay all annuities and legacies given in a will, and that they, in case of deficiency, should abate rateably. The only question lies between the alternative and varying annuities given to Mrs. Corbett, the widow, and the legacies of £12,000 given to each of his daughters. As to the son he is clearly postponed to both as residuary devisee. It was in this case especially doubtful to the view of the testator, if there would be a deficiency. His property was of uncertain value, principally in a partnership trading upon flocks and herds, and he directed a hazardous special business to be carried on by his trustees at the risk of his residuary estate, and very large charges were for annuities, of course uncertain as to the longevity of the annuitants. As far as I can collect, the death of Mrs. Corbett now would make the property solvent as to her daughter's legacies, much more so if it had occurred just after the testator's. The authorities are against giving weight to words "in the first place," &c., even if coupled with directions to pay in order stated; but here there is a direction to pay, say out of *corpus* or income, £1000, quarterly from testator's death, without deduction not referring to any taxes or expenses—affording argument that it meant without deduction for other liabilities of the estate under the Act. The annuity to the wife was the only immediate provision for the whole family, infant son and daughter, certainly the former. And I rather think that no interest was given on the £12,000 legacies to the daughters until the period of distribution—the youngest child coming of age. There is a provision for interest if the trustees postponed the payment of the legacies after that time, and there is also a provision at the option of the trustees for maintenance out of presumed shares. The right of £12,000 to the daughters being paid depended on

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their attaining 21 before the time of distribution, and there were limitations over in the event of their not doing so. I think the language of the will left it to the discretion of the trustees to set apart sums of £12,000 to meet and secure the legacies, and if it were set apart I think the trustees might withdraw them for other purposes, as for paying annuities. They could not pay the legacies until the period elapsed. I have asked myself, if I decide for the legatees, what order should I make, and I fully felt the difficulty, and I think I should do only what the trustees could and should have done. There are cases in which trustees had to invest a sufficient sum for annuities, and at the same time pay legacies (*Thwaites v. Foreman*, 1 C., 400). There a proportionate abatement might be made in the sum invested and the legacies. Here I should have to provide such proportionate abatement between the widow annuitant at once for £4000 as long as any child was under 21, thereupon giving her a legacy of £6000 and annuity of £2000; in the next place to set apart £12,000 for each daughter, with limitations as to their children if they died under 21, and other limitations. The codicil reduced the annuity to the widow to £3000 for a term of six years. There were annuities to other persons in the event of their surviving the widow. There is a provision in some events for an establishment for the maintenance of the family, and in the codicil for the whole family being conveyed at certain expense to England for education, on the eldest son's attaining 16 years of age. I have found cases as to the mode of appointment where directed (*Wroughton v. Colquhoun*, 1 De G. and Sim. 357) and other cases referred to. I am prepared to declare that the annuities in the will to the testator's wife are payable in priority to the legacies of £12,000 to his daughters. I shall direct the usual administration accounts so far as any party may require; reserve further directions and costs. Liberty to apply.

PIRIE v. SMITH. March 31.

Where a will directs that the income of certain property should be paid jointly to two persons, and in the case of the death of one, to the survivor. Held *that such persons were entitled to only a life interest of the property jointly, and on the death of either the whole income would go to the survivor.*

The plaintiffs, William Pirie and Jemima Davies, brought the action against the defendants to obtain the opinion of the Court as to the construction of the will of Margaret Pirie, late of Hotham. Mrs. Pirie died in 1878, having by her will appointed Mr. Ramsay as her executor. By the will she directed that the income of her property should be paid jointly to her children, and in case of the death of one, to the survivor, and in the case of his or her death to the children, if any. The plaintiffs claimed that under the will they were entitled to all the property. Mr. Ramsay died about two years ago, and the defendants were appointed executors and trustees of his will. They refused to give the *corpus* of the estate to the plaintiffs, and this action was therefore brought.

MR. WORTHINGTON for the plaintiffs; Mr. TOPP for the defendants.

HIS HONOR held that the plaintiffs were entitled to only a life interest in the income of the property jointly, and on the death of either the income was to go to the survivor, and he made an order accordingly.

(Before His Honor Mr. Justice Williams)

1st April.

M'HUGH v. ROBERTSON. BENN v. SYMES.

21 Geo. III., c 49—The Act of 21 Geo. III., c. 49 is in force in the colony of Victoria.

These actions were brought to test the legality of certain entertainments held on Sunday in the Hall of Science. In the first-named case the plaintiff was a constable, and, acting under instructions, he sued J. S. Robertson for managing and conducting an entertainment, for admission to which payment was charged, at the Hall of Science on the 19th October last, and sought to recover from him a penalty of £100, imposed by the Act 21, George III., c. 49, which was an Act passed by the Imperial Parliament in the year 1781, "for preventing certain abuses and profanations of the Lord's Day." The defendant, among other defences, submitted that the Act under which the action was brought was not in force in Victoria, and an order had been made postponing the trial of the questions of fact till this question of law was disposed of. In the action of *Benn v. Symes* it was sought to recover the penalty of £100 from the defendant for being the keeper of a hall to which a charge for admission was made on Sunday.

MR. CHOMLEY and MR. BOX appeared for M'Hugh; MR. MACDERMOTT appeared for Benn; MR. LEWIS appeared for Robertson; and the defendant, Symes, appeared in person.

MR. JUSTICE WILLIAMS said: These are proceedings taken to recover certain penalties from the defendant in each case for offences against the Act of Parliament 21 Geo. III., c. 49, intituled "An Act for preventing certain abuses and profanations of the Lord's Day, called Sunday." The offence charged in the first case is that of having been on a Sunday the manager and conductor of a certain entertainment and amusement in a place called "the Hall of Science," to which the public were admitted by the payment of money. The offence charged in the second case is that of having been the keeper of the same place on a Sunday when used for public entertainment and amusement, and for publicly debating a certain subject, to which persons were admitted by the payment of money. At the present stage of these cases the question as to whether what took place in the Hall of Science

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on the Sundays specified was "an entertainment and amusement," or as to whether that place on those Sundays was "used for public entertainment and amusement and for publicly debating" does not arise. The single question that is presented to me for my consideration at this stage is whether the Act 21 George III., c. 49, is in force in this colony. That is a pure question of law; and for the purpose of deciding it, and merely for that purpose, I *assume* that if the act be in force, the defendants have offended against its provisions. I therefore express no opinion upon any of the other questions that were argued, for the reason that those questions are not now before me for decision, nor do I feel called upon to express any opinion upon the arguments (1) as to the policy of continuing the act in force; (2) of it having been allowed to fall into disuse; (3) of the danger of its provisions being unequally administered. These are all matters for the Legislature to consider, and sitting as a judge bound to administer the law as I find it, are clearly not within my province. Is, then, the Act mentioned in force in this colony? Whether it be in force or not depends upon the answer to be given to this question: Can its policy and provisions be reasonably applied to the condition and circumstances of this colony? (*Whicker v. Hume*, 21 L. J. Ch., p. 409). Whether it be contended that the first settlers brought it with them, or that it came here by virtue of the provisions of 9 Geo. IV., c. 83, s. 24, the test to be applied is the same —can the act be *reasonably* applied here? If it can, it is in force; if it cannot, it is not in force. As the Act in question preceded the Act 9 Geo. IV., c. 83, I proceed, applying the test I have mentioned, to consider whether the earlier Act is in force in this colony by virtue of the enactment contained in the later. To decide the question of "capability of being reasonably applied," it is necessary to ascertain:—First, what is or may be the policy of the Act; secondly, to ascertain what is the condition, and what are the circumstances of the colony to which it is sought to apply the Act, and then to decide whether having regard to that policy, to that condition, and to those circumstances, the Act can be reasonably applied; or as put by Dowling, C. J., in *Reg v. Maloney*, Supreme Court, N S.W., are the provisions of the Act intended to be applied adapted to the *status personarum* actually existing in the colony into which it is to be transplanted? I have had much argument upon the policy of the Act, the counsel for the plaintiff in each case taking upon this point a different view. Mr. Box contended that the main object and policy of the Act is to preserve Sunday as a civil institution—in other words, as a day of rest; that the preservation of Sunday as a day of rest is beneficial to the State, and consequently is a matter of State policy; and that if this be the object and policy of the Act, it can, in so far as this object and policy is concerned, be reasonably applied to the condition and circumstances of this colony. Mr. M'Dermott, however, contended that the policy and object of the Act is to compel the *religious* observance of the Sunday; that it was passed in England to enable the State to co-operate for that purpose with the State church in England; that as a day of religious observance it is part and parcel of Christianity; that Christianity is part of the common law of England; that therefore the religious observance of Sunday came to this colony as part of the English common law; and that if this be so all Acts prior to 9 Geo. IV. in furtherance of that principle of the common law must be applicable. Taking this contention first, I commence by considering whether, apart from the question of whether Christianity is or is not a part of the common law of England, the Act, assuming its policy and purport not to be that for which Mr. Box contends, but to be an Act for the purpose of assisting the State church, to compel the religious observance of Sunday, can reasonably be applied to the condition and circumstances of this colony. I have no hesitation whatever in stating that if that be its policy and purport it is totally inapplicable to the conditions and circumstances of this colony, We have no State church here, no State religion; the State recognises no distinction of sect or denomination; all are equal; no one sect or denomination stands in any better or in any worse position than any other. Archbishops and bishops and all other orders and degrees of the heirarchy have no status outside the limits of their own denomination. The various denominations themselves are mere voluntary associations (*In re the Lord Bishop of Natal*, 3 M. P. C. C. N. S, p. 148.) The State, as far as public legislation is concerned, stands aloof from all denominations and all sects, and is just as likely to countenance an act to compel the religious observance of the Jewish Sabbath by Christians as to compel the religious observance of the Christian Sabbath by Jews. If, therefore, the policy of the Act in question is to compel the co-operation with the State church, the religious observance of the Sunday, as we have no State church here; it is, apart from many other reasons to which it is unnecessary to refer, totally inapplicable to the condition and circumstances of the colony. Then it is said, taking the other branch of the argument, Christianity is part of the common law of England; whatever is part of the common law of England is in force here except in so far as it has been repealed by statutory enactment. The religious observance of Sunday is part of Christianity therefore the religious observance of Sunday is part of the common law of England; therefore it is part of the common law here; and therefore any Act in furtherance of that portion of the common law must be applicable here. This is admirable logic, but, unfortunately, it abounds in that which is so frequently resorted to by would-be logicians of the present day —an assumption of premises. It is assumed that Christianity is part of the common law of England,

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and it is also assumed that the religious observance of Sunday is part of Christianity. I have not been referred to any legal authority in support of the latter assumption, and I know of none; and in default of legal authority upon the point, I must decline to accept as an established fact that the religious observance of Sunday is a part of Christianity, and if I were to go to the fountain head or origin of Christianity, I might possibly find authority, though not legal authority, the other way. This failure is sufficient to destroy the sequence, but the other proposition, in the terms in which it is stated, though at one time not destitute of legal authority, now is. In the very recent case of *Reg. v. Ramsay and Foote*, 48 L. T. N. S., p. 735, also reported in 15 C. C. C., p. 234, Lord Chief Justice Coleridge thus states the law upon the point:—

"The old cases can no longer be taken to be a true statement of the law as the law is now. It is no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. In the times when these dicta were uttered, Jews, Roman Catholics, Nonconformists of all sorts, were under heavy disabilities for religion—were regarded as hardly having civic rights. Everything almost, short of the punishment of death, was enacted against them. The epithet 'ferocious,' which has been applied to the statute of William III., to which so much reference has been made, is hardly stronger than that statute deserves. Jews, it is true, were excluded from Parliament in a sense by accident, for the oath which excluded them was not pointed at them, but no one can doubt that at that time if it had occurred to anyone that they were not excluded, a law would have been forthwith passed to exclude them. Historically, and as a matter of fact, such was the state of things when these dicta were pronounced. But now, so far as I know the law, a Jew might be Lord Chancellor, most certainly he might be Master of the Rolls. The great and illustrious lawyer, whose loss the whole profession is deploring, and in whom his friends know that they lost a warm friend and a loyal colleague, he, but for the accident of taking his office before the Judicature Act came into operation, might have had to go circuit, might have sat in a Criminal Court to try such a case as this, might have been called upon, if the law really be that 'Christianity is part of the law of the land,' in the sense contended for, to lay it down as law to a jury, amongst whom might have been Jews, that it was an offence against the law, as blasphemy, to deny that Jesus Christ was the Messiah, a thing which he himself did deny, which Parliament had allowed him to deny, and which it is just as much part of the law that any one may deny, as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of a bare denial of the truth of Christianity *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale and Lord Raymond and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows, and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression; I call it progression of human opinion. Therefore to take up a book or a paper to discover merely that in it the truth of Christianity is denied without more, and thereupon to to say that now a man may be indicted upon such denial as for a blasphemous libel, is, as I venture to think, absolutely untrue."

In either aspect, therefore, it appears to me Mr. M'Dermott's argument fails. Upon his definition of the policy of the Act, it is manifestly inapplicable in this colony, and the syllogistic form of argument by which he endeavoured to render the Act applicable from another point of view, completely breaks down, by reason of his assumed premises turning out when examined to be not only devoid of authority, but absolutely incorrect. Mr. Box's argument proceeded on totally different lines, the contention being that the policy of the Act was to preserve Sunday as a day of rest, as a great civil institution beneficial to the State; and that in this view it is reasonably applicable to the condition and circumstances of this colony. If this be its policy, I not only think the argument is of much weight, but I should be disposed to hold for that purpose, and to that extent the Act can reasonably be applied in this colony. But is this the policy of the Act? If it be, it is somewhat singular that in the recent case of *Terry v. The Brighton Aquarium Company*, 32 L. T. N. S., p. 459, Blackburn and Field, J.J., regret that they have no ground for believing that the Act did not continue in force, and state that the penalties are enormous and the provisions are oppressive, but that as the Act had not been repealed, their duty was to administer its provisions. Field, J., proceeding to observe, "I think those persons who are anxious to induce people to frequent publichouses on Sunday less than they at present do, might greatly aid their object by obtaining the repeal of this statute, and by encouraging such entertainments as these;" and counsel in the course of argument express, without dissent, their surprise that such a statute had not been long ago repealed. Now, it is not likely that observations such as these would have been made upon the Act were its policy such as has been contended for by Mr. Box. But, notwithstanding this, I am with much doubt disposed to think the Act has a twofold policy—first, to support and uphold a State church, for which purpose it is wholly inapplicable here; second, to preserve the Sunday as a day of rest, as a civil institution beneficial to the State, and for this purpose and to that extent applicable. It may be asked, how do I arrive at this latter view? Chiefly from the fact that this and other Acts dealing with the same subject are evidently directed against anything in the nature of *trading* or performing any work for which a *charge* is made on Sunday. In other words, the Act recognises the right of any individual or collection of persons to give any entertainment or to meet for the purpose of the discussion of any subject on Sunday, *provided* no charge is made. There stand upon the English statute books a number of acts directed against trading on Sunday, some of which are recognised by statutes of our own Legislature, and the same principle, it seems to me, is involved in the Act under discussion. It may be that the object was to deprive people, as much as possible, of any *inducement* to work on Sunday, so in turn

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preventing the possibility of others being induced either by threats or promises to co-operate in such work, thus securing, as far as possible, the observance of that which the State may have regarded as beneficial to itself, viz., of one day in the week as a day of rest. For it is obvious that the making of gain might, and probably would, induce many to work on a Sunday who, without that inducement, would observe it as a day of rest, and, what is more, the making of gain might beget an exercise of compulsion on the part of employers upon employed to furnish their services on the same day for the same purpose. Now, I think that, as a civil institution, as a day of rest, Sunday may be regarded as an institution beneficial to the State, and if the reasons I have given, which I chiefly deduce from the fact that this Act and other acts in *pari materia* are all directed against work or performances for gain on Sunday, show this to be one of the objects, and a substantial part of the policy of the Act, I think, to that extent and for that purpose, I may be justified in holding that it can reasonably be applied in this colony, especially as the provisions of an Act somewhat in *pari materia* (the Act 29, Car. II., C. 7) have been expressly applied to this colony by virtue of the provisions of our Police Offences Statute. There is certainly a great deal in the Act, however, which gives it a decidedly ecclesiastical ring, particularly the preamble and secs. 3, 7, and 8. This, coupled with its highly penal and highly oppressive provisions, cause me to entertain doubt upon a point upon which I wish I could pronounce a more decided opinion. There is, however, a third view, which, strange to say, was not presented to me in argument, but which is capable of being presented, and that is that the object of the Act is to prevent the occurrence of possible or probable breaches of the peace, which might be occasioned by holding secular entertainments or discussions on Sunday. In other words, that it is in the nature of a police measure to prevent the religious animosity of the *dominant* sect being excited to an extent calculated to provoke a breach of the peace by reason of the secular nature of the entertainment or discussion. There is certainly much in favour of this view, especially when we consider the period of English history at which the Act was introduced—"The Lord George Gordon Riots." But if that be the object of the Act, why the qualification as to "admission by payment?" For in that view the holding a discussion within the purview of the Act, for admission to which there is no charge, would be quite as objectionable and fraught with quite as much peril. Again, as both liberty and toleration have made enormous strides in a forward direction since the date at which the Act was passed, the risk of breaches of the peace so occasioned has been reduced to a minimum, particularly when we bear in mind that we have here no State church, nor any *dominant* sect. I am, therefore, disposed to think that if this be the object of the Act, as it well may have been at the period of its passing, *qua* that object it cannot reasonably be applied to the condition and circumstances of this colony. It seems to me, therefore, that it is only by giving the Act the object and policy for which Mr. Box contended that it can be rendered reasonably applicable to our condition and circumstances. Whether that policy and object can be legitimately given to the Act is a question on which I must confess I entertain great doubt. It was also contended for the defendants in support of the argument of non-applicability that the Act was by the preamble limited to the cities of London and Westminster; but that this is not so is clearly shown by the case of *Terry v. The Brighton Aquarium Company*, to which I have already referred. In other words, the operative part of the Act is wider than the preamble. Then it was said the Act was inapplicable here, because all proceedings in respect of offences committed against its provisions must be taken in Her Majesty's Courts of Record at Westminster, but this objection is abundantly met by the provisions of the Act 6, William IV., No. 12, by which it is enacted that Acts required to be done in the Courts at Westminster may be done in the Supreme Court of the colony. During the argument several decisions of this Court upon other Sunday acts were cited, notably *Garton v. Coy*, 4 A. J. R., p. 100. Sitting as a single judge I cannot question or even consider the correctness of decisions of the Full Court. It may be that it is desirable to have the question of the general applicability of the Sunday Acts, as they are termed, settled by a considered judgment of the Full Court once for all, involving, perhaps, a re-consideration of the cases cited to me in argument. I entertain, therefore, some hope that this case may proceed to the Full Court on appeal from my decision. As at present advised, I order judgment to be entered for the plaintiffs in both actions on the point of law submitted to me, without costs.

(Before Mr. Justice Molesworth.)

BARNARD V. PURVES AND OTHERS. April 9.

Victorian Racing Club Committee—The committee of the Victorian Racing Club have power to expel a member of the club, and the Court will not review their decision.

Application for an injunction to restrain the committee of the Victorian Racing Club from preventing Barnard enjoying the privileges of the said club.

MR. TOPP appeared for the plaintiff; MR. A'BECKETT, MR. PURVES, and DR. MADDEN for the defendants.

MR. JUSTICE MOLESWORTH, in giving judgment, said: This is an action by Mr. Barnard, a member of the Victorian Club, against Mr. Purves, and six other members of the committee of it, complaining of the committee having irregularly and improperly

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expelled him. A dispute occurred between two members of the Club—Mr. Milne, living in Adelaide, and Mr. Fleming, and was brought before the committee as to the expulsion of the latter. The imputation against Fleming was that he acted upon a telegram from Milne, authorising him as agent for Milne, to effect a bet on Milne's behalf on a horse of Fleming's for a race, which telegram arrived after the race and the horse being beaten, and that Fleming alleged to Milne that he had got the telegram in time, made the bet, and sought to charge Milne with the amount. This charge against Fleming was pending on September 14, 1884. Mrs. Fleming in her husband's absence being anxious on the subject, requested Mr. Summers, another member, to call upon the plaintiff, and request him to induce his brother, Mr. Simeon Barnard, living at Adelaide, to adjust the matter with Milne. In consequence of this the plaintiff sent to his brother a telegram, 17th September, 1884—"See the party in question *re* Charles Fleming matter. Get it settled privately on best terms. Left in your hands to settle. It means ruin to him otherwise. Do best." This implies that S. Barnard knew whom to settle with. And on the 18th plaintiff sent another telegram—"See Simms, and get him as well as yourself to try and settle Fleming's matter. Don't leave stone unturned. Poor devil awfully cut up. Utter ruin to him. Try best." The plaintiff alleges that in sending these telegrams he was entirely ignorant of the imputations against Fleming, or of any charge before the committee. A committee meeting was held to investigate the charge against Fleming on 19th September, and adjourned to the 17th October, on which day the plaintiff says he attended as a witness only, and these telegrams were produced; but plaintiff says he stated he knew nothing of the matter when he sent the telegrams, and heard no more of the evidence given against Fleming. On 24th October, the committee expelled Fleming as guilty of conduct detrimental to the interests of the club. On 12th November the plaintiff got a letter from the secretary requesting his attendance on the 14th. The plaintiff says that on the 14th the committee began by informing him that they had decided upon suspending him for a year; that he remonstrated at being so treated without charges. Affidavits on the other side say that plaintiff and Summers were then told the charge was interfering and attempting to prevent the investigation by the committee, and that the committee would suspend them both for a year, and that they both requested a postponement to the next meeting of the committee and that they wonld bring evidence to satisfy it that they did not know of this charge against Fleming, and that it could then deal with them; and that the committee then informed them that it would adjourn for a time of which they should have notice, and that it would then hear evidence and receive explanations. At the next meeting, as to the date of which there is some confusion, evidence was offered as to what occurred in the request of Summers to plaintiff to send to Adelaide. The committee informed plaintiff and Summers that the previous decision was altered to a fine of £50. The affidavits on the other side say that they both expressed regret at their conduct, and made no protest against the resolution. Plaintiff consulted his solicitor, did not pay the fine, and on 5th December the secretary of the committee wrote to him for payment. He did not himself answer the application; but on the 10th plaintiff's solicitor wrote, requesting to be informed by what authority and under what rule the fine was imposed and under what rule it was intended to deal with him. The committee never answered this, treating it as a matter in which they would not recognise the interference of a solicitor. At the commencement of the matter the proceedings of the committee had been informal, treating a witness as a person accused, without formally stating a charge against him, and somewhat flippant. But before this I cannot doubt that the plaintiff was fully aware of what the charge against Fleming had been, and what the charge against himself was, and he had offered evidence, and the committee had considered it, and, I should say, considered it insufficient to meet the evidence afforded by the telegrams themselves; and, claiming a power of expulsion, had mitigated that punishment to a fine of £50. On December 11, the secretary sent plaintiff a letter specially requesting his attendance at the office on the 12th, and saying that the matter referred to in the letter of the 5th would be dealt with. The plaintiff did not attend; perhaps he had reason to think it useless—that the matter was prejudged. But he had an opportunity of putting forward a new defence and new arguments. The committee, then, on December 16, sent him a letter recapitulating facts, that he had been found guilty of conduct detrimental to the interests of the club (words in the rules making liable to expulsion), and at his urgent appeal for mercy, the committee had substituted a fine of £50, which he refused to pay, and calling upon him to attend a meeting on the 19th inst., to show cause why he should not be expelled according to the rules. The plaintiff did not attend, sent another solicitor's letter, and got a letter from the secretary, stating that he was expelled. There are many subjects introduced in the affidavits not so material as to call for notice. But I have had a question of some difficulty as to the power of the committee to expel at all. The rules of the club refer to expulsion as a matter which may be done, not saying by whom. The committee alone—not the members—have the power of admission of subscribing and honorary members. The management of the club is vested in the committee. The committee had the power of putting a veto on new persons proposed to be

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added to their office. Members are liable to expulsion for various reasons (section 18), and in case of disturbance in the house members are liable to expulsion, fine, and suspension, at the option of the committee, and, on non-payment of the fine, to expulsion. I would infer from this the power of expulsion for offences in No. 18. As to general meetings of members, there is a provision for one only in the year, to elect committees and do general business. Special meetings are to be convened at request of 20 members for specified object, altogether very unfit to afford a discussion about expulsion. There is a provision for the committee ordering the covering of bets in a summary manner and at short notice; in default, the recusant to be expelled. This objection of power of committee was not stated in anything before the hearing. On the whole, I think that the committee had power to expel as they have done, and that I have no power to review their discretion. I have been referred to *Fisher v. Keane* (11 C. D. 353) and *Labouchere v. Wharncliffe* (13 C. D. 340). In them there were definite rules as to preliminary decision for expulsion by committee, and then for calling general meetings. The preliminary proceedings were irregular according to rules, and unjust as a decision without notice, and the member was given no opportunity of being heard. There were other irregularities as to the convening of the general meeting, and in calculating the majority, and the expulsion was held unwarranted. Refuse application for injunction, costs to be in cause.

SOUTH AUSTRALIA.

SUPREME COURT.

IN BANCO.

(Before Way, C. J., and Bundey, J.)

THE QUEEN V. MONTANA. April 24.

Criminal Law Consolidation Act, No. 38, *of* 1876 *—Admissibility of evidence—Child under ten years of age—Section* 377 *of the Criminal Law Consolidation Act of* 1876 *provides that in every prosecution for felony or misdemeanor the testimony of a child under the age of ten years may be received without administering any oath and without any formality, except that the judge shall before admitting such testimony explain to the child that he or she is required to truthfully tell what he or she knows about the matter to which his or her testimony relates.* Held, *under this section, that the evidence of a child (aged six years) who stated that she did not know the difference between truth and falsehood could not be received.*

Case reserved from the Criminal Court by Boucaut, J.

The facts are shortly as follows:—Montana was charged with carnally abusing a girl of six years of age. He confessed having committed the offence to his master, but at the trial objection was taken that the evidence of the girl herself was not receivable, inasmuch as she stated that she did not know the difference between truth and falsehood. Boucaut, J., admitted the girl's statement under sec. 377 of the Criminal Law Consolidation Act (quoted in our head-note) and reserved the point. The prisoner was found guilty.

MANN, Q.C., for the Crown, now contended that sec. 377 was especially framed to meet a case like the present. It was the duty of the judge to explain the difference between truth and falsehood to the child, and that having been done the evidence was admissible.

WAY, C. J., after setting out the facts, delivered judgment as follows: The original rule as to the admissibility of evidence was that, save in very exceptional cases, the evidence of children under the age of ten years was not received. The stringency of this rule was eventually relaxed, and the test of the admissibility of a child's evidence was the ability of the child to distinguish between right and wrong Of course the evidence of a child was not receivable except under the sanction of an oath. Now it appears to me that the object of the legislature in the provisions contained in sec. 377 of the Criminal Law Consolidation Act was simply to dispense with an oath being administered, but not to do away with the other requirements that the child should be able to distinguish between right and wrong, which in this case means to distinguish between truth and falsehood. Now in this case, according to the learned judge who tried it, the little girl did not know the difference between truth and falsehood, or what truth or falsehood meant. Under these circumstances the learned judge found it impossible to do what is required be sec. 377, viz, to explain to the child that she was required to truthfully tell what she knew about the matter; and in my opinion—an opinion in which my learned colleague concurs—the evidence of the child was not receivable. The evidence was, however, received on the understanding that a case should be reserved, and as we are now of opinion that it was not properly received the case for the Crown falls, and the prisoner must be discharged.

BUNDEY, J.: By the English law, the competency of children to give evidence is not now regulated by their age, but by the degree of understanding which they appear to possess. In England children of any age, if capable of distinguishing between good and evil, may be examined upon oath but to entitle them to be sworn they must have received some religious instruction (*See Roscoe* (C.E.) p. 115, and cases there cited). In South Australia the Legislature has, as I venture to think, wisely, dispensed with the necessity of an oath; for a child with sufficient intellect may be enabled to give intelligent evidence, but yet from defect of religious instruction, be unable to comprehend the nature of an oath, or the consequence of a falsehood. But the Act referred to provides that the presiding judge

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shall "before receiving such testimony explain to such child that he or she is required to truthfully tell what he or she knows about the matter to which his or her testimony relates." Taking the words of this clause and applying them literally, we should —if, the contention for the Crown is to be upheld —in effect decide that a man upon trial for his life would be liable to be convicted upon the unsupported testimony of a little prattler of two or three years old, whether the child has, or has not, been taught anything about truth or falsehood. How easily the credulity of such children might be imposed upon, and the consequences that might arise from such a construction are so obvious that it is unnecessary to call attention to them. On the other hand, unless children's statements are readily receivable—especially in such cases similar to that now under consideration—guilty men may escape punishment for committing one of the worst of offences. There is, however, a remedy for the latter difficulty; parents and others can teach children the difference between truth and untruth, and undoubtedly the great majority are so taught in this colony, whereas if innocent men are convicted relief may often be impossible. On a careful perusal of the clause to which I have already called attention, and bearing in mind the then state of the law upon the subject I am of opinion that the legislature intended to remove the difficulty of obtaining convictions that previous to this Act often arose through rejecting the testimony of children because they did not understand the nature of an oath, and to provide means of obtaining truthful and reliable evidence without its sanction, but they did not relieve the judge from his usual responsibility of deciding upon the competency of the witness to testify; that once decided upon, and the evidence received, the jury alone are to determine upon its credibility. To hold otherwise would, as it seems to me, render meaningless the obligation cast upon the judge to "explain to a child that he or she is required to truthfully tell what he or she knows about the matter to which his or her testimony relates," and if upon such explanation he finds as my learned colleague found in this case, incapacity t understand what is said, and that the child knows no difference between truth and untruth to reject such testimony on the ground of incompetency. No doubt some children of very tender years are most truthful and intelligent witnesses, often more so than those much older —and the age of a child is by no means the test; the test in this colony is their competency to understand that it is their duty to speak the truth, and this in all cases is to be ascertained by the judge as a preliminary step. In England, a child six years old was allowed to be sworn, and to testify as to a rape having been committed on her, she having stated to the judge that she said her prayers and thought it was wrong to tell lies (see *Reg. v. Holmes*, 2 F. and F. 788). In that case (the nearest in resemblance to the one before us I have read) the child's evidence was received because it complied with both the requisites of the English law, viz., she possessed the necessary understanding, and had received a sufficient share of religious instruction. The distinction between the case just referred to and that now under our consideration has already been pointed out. The colonial legislature has dispensed with the religious test, but a sufficient understanding of the difference between telling a falsehood and telling the truth is as necessary here as in England to entitle such evidence to be received. In this case it is clear no such understanding did exist and, therefore I think the evidence was not properly receivable, and am reluctantly forced to the conclusion that the conviction must be quashed.

Conviction quashed.

INSOLVENT COURT.

(Before the Commissioner of Insolvency.)

Re GOLDSACK AND ANOTHER.

Insolvency Act 1860—Deed of assignment Section 175 *of the Insolvent Act* 1860 *provides that the Court on the application of any creditor may, within two months from the execution thereof by the debtor, declare a deed of assignment fraudulent and void as against the assignees in insolvency, and that such deed shall be void accordingly if adjudication of insolvency be obtained against the debtor within seven days of the date of the order on the ground that such deed was not really executed within the seven days hereinbefore limited, and after such two months and within twelve months thereafter on the ground that such deed has not been signed or assented to in writing personally, or by a duly authorised agent, by three-fourths in value and one-half in number of the creditors of such debtor, or at any time within the said twelve months on the grounds of fraud, or of any wilful and material error or omission in either of the schedules annexed to such deed. Section* 41 *provides that no person shall be liable to become insolvent by reason of any act of insolvency committed more than twelve months prior to the filing of any petition for adjudication of insolvency against him.* Held, *under these sections that a deed of assignment can be set aside within two months of the date of its execution on the ground of fraud.*

G. and M. executed a deed of assignment under the Insolvent Act 1860, and a few days before the execution of such deed M. drew from the bank the sum of £457, which he alleged to have been lost prior to the execution of the deed, and which was not mentioned in the deed.

A. G. DOWNER now moved to set aside the deed under section 175 (*vide* headnote) on the grounds of fraud and wilful and material omission from the schedule, the omission being the £457, which was

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drawn from the bank and alleged to have been lost.

THE COMMISSIONER (J. M. Stuart, S. M.) in delivering judgment, said: If this were an investigation in insolvency upon the evidence adduced there would be good cause for grave suspicion that the sum of £457 had been fraudulently made away with for the purpose of depriving the creditors of that portion of the private estate of Mitchell. But this application having been made within two months of the execution of the deed, my attention was naturally called to the case of *re Burley* (5 S.A.L.R. 5), where the late Chief Justice ruled that an application similar to the one now being made could be made by reason of the construction of the 175th section within fourteen months. That being his decision, the natural sequiter from that judgment was that for two months antecedent to the subsequent twelve months there was no right to come to this Court to set aside the deed on the ground of fraud. Since the decision to which I have referred, various amending Acts of Parliament have been introduced. In none of these, however, is any provision whereby an act of insolvency can be used for the purpose of adjudication where the act of insolvency is over twelve months old. The setting aside of a deed by this Court has no effect whatever unless the order setting it aside is followed by an adjudication. The deed when set aside operates as an act of insolvency for the purpose of adjudication. If the setting aside of a deed was not a matter within twelve months, then no adjudication could follow, and such setting aside would be a void act on the part of the Court. Under section 175 it would be useless to set aside the deed unless the rule *nisi*, if I may so call it, were followed by a rule absolute adjudicating the grantor of the deed insolvent. It is not my province to question the decisions of the Supreme Court in matters of this description, and had I been Commissioner at the time of Burley's case I should have been bound by it. Were I to follow it now I think there would be a miscarriage of justice, because the fraud alleged could not be inquired into at once. The introduction, however, of new legislature affecting deeds of assignment, and the apparently unconsidered judgment of the late Chief Justice Hanson, justify me in coming to the conclusion that frauds can be inquired into immediately a deed is executed, and I think I may fairly ask the Supreme Court if necessary to reconsider the decision in Burley's case in the light of the new statutes relating to deeds of assignment. This deed must be set aside in the terms of the application.

VICTORIA.

IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

May 2.

BANK OF AUSTRALASIA v. MILLER AND STEWART.

Rules of Supreme Court 1884, *Order XIV. r.* 1—*Joint promissory note — Judgment recovered against one of the parties jointly liable—Judgment vacated without leave of the Court or a judge—Where a judgment was obtained against one of the parties liable on a joint promissory note, and such judgment was vacated without the leave of the Court or a judge, the other party jointly liable should not be deprived of the opportunity of pleading judgment recovered by having final judgment entered against him under Order XIV., r. 1.*

Application on behalf of the plaintiffs for leave to enter final judgment under Order XIV., rule 1.

MR. HOOD in support; MR. HODGES to oppose.

It was stated on behalf of the defendant Stewart that he had been served with this summons, but that he did not oppose the application.

MR. HODGES: I wish to use an affidavit sworn by the plaintiff in another case.

MR. HOOD: This affidavit cannot be used as it is not sworn in this case.

HIS HONOR: I will allow this affidavit to be used. Any affidavit made by the plaintiffs may be used against them.

MR. HODGES: According to the statements made in this affidavit it appears that a previous action was commenced by the plaintiffs against one of the defendants, Stewart; that this action proceeded to judgment, and that judgment was obtained by the plaintiffs against Stewart. The plaintiffs have vacated this judgment. After this judgment this action was commenced by the plaintiffs against the present defendants, Miller and Stewart, and the plaintiffs now apply for leave to sign final judgment against both the defendants, stating that a partnership existed between them. I submit that this summons should be dismissed on the ground that the cause of action has passed over to, and is merged in the judgment. The cause of action is gone, and the plaintiffs cannot revive it by any act of theirs (*Ford v. Beech*, 11 Q. B. 852.) Where the cause of action is once gone, it is gone for ever. Judgment is an extinguishment of the cause of action, and the plaintiff's remedy is on the judgment they have recovered against Stewart.

MR. HOOD: There is no new rule with regard to vacating a judgment. Sec. 41 of the Judicature Act 1883 provides that the practice and procedure of the High Court of Justice in England shall be adopted and followed in the Supreme Court. The practice as laid down by Chitty is that the plaintiff may waive a judgment where it is irregular, and that the plaintiff could vacate it. If the plaintiff,

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once getting a judgment, is to be prevented from setting it aside, he may be debarred from obtaining his rights. (*Munster v. Railton*, 11 Q. B. D. 435.) This application is merely for the purpose of delay. Where it is shown that giving the defendant leave to defend would merely delay the plaintiff's rights, such leave should not be given. (*Lloyd's Banking Company v. Ogle*, 1 E. D. 262.)

His Honor said: Application on the part of the plaintiffs to be at liberty to enter final judgment in an action brought to recover £1011 16s. 8d. due upon a promissory note. The application was not opposed by the defendant Stewart. A previous action for the same cause was brought against the defendant Stewart alone, and judgment was duly obtained and entered against him. The plaintiffs, treating that judgment as though it were an irregular judgment, vacated it, and commenced this action against the two defendants. That proceeding, taken without leave of the Court or a judge, was calculated if it was not intended to deprive the newly-made defendant Miller, of the defence to which he might be equitably as well as legally entitled. A judgment without satisfaction recovered against one of two joint debtors was a bar at common law to an action against the other debtor, and was pleadable in bar, and not in abatement (*King and Another v. Hoare*, 13 M. & W. 494), nor was this a mere technical rule of procedure at law only. There is no settled rule of equity that a contract which is in terms joint, and would be so construed at law is to be treated in equity as joint and several, and accordingly the rule laid down in *King v. Hoare* is still in force under the system established by the Judicature Act 1883 (See *Kendall and Others v. Hamilton*, 4 A. C. 504.) If the defendant Miller should be able to bring himself within that rule, he ought not to be deprived by the unwarranted act of the plaintiffs in vacating the judgment obtained against his co-debtor, of the opportunity of pleading the defence of judgment recovered. I refuse the application with costs. I certify for counsel. The defendant Miller to have seven days further time to enter his defence.

Solicitors: For plaintiffs, *Klingender, Charsley* and *Dickson*; for defendant Miller, *Madden* and *Butler*; for defendant Stewart, *Malleson, England* and *Stewart*.

Flamstead v. Briggs. May 4.

Rules of Supreme Court 1884, *Order XXXVI., r. 39—Entry of judgment—A judge may direct a verdict to be entered for either party either at or after the trial.*

Application on behalf of the defendant that the judgment entered herein for the plaintiff for £250 be set aside on the ground that such judgment was not at the trial thereof directed by the judge to be entered, nor was such judgment directed or ordered to be entered by the Court or a judge as directed by the rules.

Mr. Isaacs, in support: Judgment was not entered at the trial. Order XXXVI., rule 39, provides that "the judge may, at or after the trial, direct that judgment be entered for any or either party;" this does not say that judgment shall be obtained in any particular way, but Order XL., rule 1, provides that, "except where by the act or by the rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion to the Court for judgment. The defendant complains that the plaintiff in the absence of the defendant asked the judge who tried the case for judgment, and that the judge in the absence of the defendant ordered that judgment be entered. I submit that it is evident from these rules that unless the judge direct that judgment be entered directly after the finding, that the judge cannot afterwards do so; in such a case, the only way to obtain an entry of the judgment is by motion, when notice would have to be given to the other side. I likewise apply that all proceedings in this case may be stayed until an application on behalf of the defendant for a new trial has been determined by the Full Court.

Mr. Goldsmith, to oppose: This is an act of the judge at the trial, and is entirely within his discretion. If the judge had no power, I submit that this application should be made to the Full Court under Order XL., rule 5. Order XXXVI., rule 39, contemplates that the entry of judgment shall be the act of the judge. The judge who tries the case has a personal control over the trial, and may order judgment to be entered. Order XXXVI. refers to the entering of judgments in the main, whereas Order XL. refers to particular cases. With regard to the application for a stay of proceedings, the only reason given for the application is that an application for a new trial in this case is about to be made to the Full Court. If this were granted it might hang the matter up indefinitely and virtually deprive the plaintiff of the fruits of her verdict.

His Honor said: Application by Mr. Isaacs to set aside a judgment directed to be entered by Mr. Justice Williams for £250, on the ground that such judgment was not at the trial thereof directed by the judge to be entered, nor was such judgment directed or entered by the Court or a judge as directed by the rules. The facts are by no means clear. An affidavit is made by a person who was not at the trial to the effect that the judge did not direct that judgment should be entered at the trial; this, of course, must be mere hearsay. I said that I would mention this matter to the judge who tried the action. I have done so, and he informs me that it is his almost invariable practice to order that judgment be entered by his associate directly after the finding, and that, speaking from memory, he thinks that that was most probably done in this case. I do not think that the contention of Mr. Isaacs can be supported even assuming

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that the judgment was not directed to be entered upon the day on which the verdict was returned. Order XXXVI., rule 39, expressly provides that "the judge may direct a verdict to be entered for either party, either at or after the trial." Order XL., rules 3 and 4, recognise the fact that judgments may be entered either at or after the trial, and there are other rules which assume the existence of this power. If the objection were a good one, it would be one going to the jurisdiction, and would require to be addressed to the Full Court. There was an application in the alternative that the proceedings might be stayed until an application for a new trial had been made to the Full Court. I see no reason for granting that application. This application I take to be an application to strike out a judgment, and that application I strike out with costs. I certify for counsel.

Solicitors: For plaintiff, *Watson*; for defendant, *Cleverdon*.

JOHNSTON v. BOYD. May 7.

Agreement to abandon action—Where the plaintiff, in the full possession of his senses, and with the advice of a friend, enters into an agreement to abandon the action, he will not be allowed to continue it in breach of such agreement.

Application on behalf of the defendant that the proceedings in this action be stayed, on the ground that the plaintiff agreed to abandon such action.

MR. HOOD, in support: The action was one for nuisance, caused, as it was alleged, by water from the defendant's house and grounds running on to the plaintiff's land and causing injury to the plaintiff's house. The defendant's solicitor obtained leave from the plaintiff for the defendant to examine the plaintiff's property. The defendant accordingly went with some friends and made an examination, with the concurrence and in the presence of the plaintiff and a friend. After the examination, the defendant and his friends advised the plaintiff to stop the action, telling him that he was bound to lose money over the matter. The plaintiff's friend also advised him to settle the matter, and the plaintiff finally asked the friend to speak to the defendant and see what terms could be made. The upshot of the negotiations was that an agreement was drawn up in writing, by which the plaintiff agreed to abandon the action, to pay his own costs. This agreement was drawn up by one of the defendant's friends, and was signed by the plaintiff and defendant, and was witnessed by the plaintiff's friend and the defendant's friend, who drew up the agreement. This agreement to abandon the action was a valid one, and the plaintiff ought not to be allowed to set it aside and go on with the action (*Webster v. Acton*, 11 W. R. 114; *Eden v. Naish*, 7 C. D. 781; *Notman v. The Anchor Co.*, 6. C. B. N.S. 539).

MR. HODGES, to oppose: This agreement was drawn up by one of the defendant's own friends. The plaintiff thought these persons were experts, who had authority to inform the Court as to the damage done to his premises. The defendant and the army of people who came with him told the plaintiff that there was no use going on with the case as he could not succeed, and would only lose money. The agreement was obtained by undue pressure, and ought to be set aside. If anything had been done under the agreement it might be another matter, but, as nothing has been done, the defendant cannot be injured by the action proceeding.

HIS HONOR said: If there were any grounds for holding that this agreement was obtained by misrepresentation or undue influence, I should not hesitate to set it aside. The plaintiff says that he was led to enter into this agreement because of the adverse opinion of the defendant's friends, whom he thought were experts. It does not appear on what grounds the plaintiff arrived at this conclusion about these gentlemen, but the impression does not seem to have been produced by anything said or done by the defendant or his friends. It must be remembered that the plaintiff was not without advice in the matter. His own friend told him that it would be better to settle it, and he asked his friend to see the defendant about a settlement. Under the circumstances, I think it would be contrary to good faith if the plaintiff were to go on with the action. He was in full possession of his senses, and was not without advice. I think this application ought to be granted without costs. I certify for counsel.

Solicitors: For plaintiff, *Croker*; for defendant, *Pavey* and *Wilson*.

May 12, 15.

LAFFY v. DOUGHARTY.

Rules of the Supreme Court 1884, *Order XIX, r.* 27, *Order XXV., r.* 4—*Forms by which the object of demurrers may be obtained—The proper ground for striking out a pleading as embarrassing is that the pleading will embarrass the fair trial of the action.*

Application on behalf of the plaintiff to strike out paragraph one of the defendant's counter-claim, on the ground that it discloses no cause of action, or, failing that, to strike out or amend the same on the ground that the same is embarrassing.

The statement of claim was as follows: The plaintiff has suffered damage by the defendant's wrongfully depriving the plaintiff of 316 sheep and 112 lambs, by forcibly taking them out of the plaintiff's possession, whereby the plaintiff lost the value of the said sheep and lambs, and the profits he would have made on a re-sale of the same. To this, in his statement of defence, said (1), The defendant denies that he wrongfully deprived the plaintiff of the sheep and lambs mentioned in the statement of claim. (2). The defendant, on express

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condition that the plaintiff would pay to the defendant £40 14s. in cash, and would give his promissory note for £116, payable 30 days after date thereof, agreed to sell and deliver to the plaintiff the aforesaid sheep and lambs. (3.) The defendant, in pursuance of the aforesaid agreement, and believing that the plaintiff had duly paid the said sum of £40 14s. in cash, and had given his said promissory note for £116 as aforesaid, did deliver to the plaintiff the sheep and lambs. But the plaintiff did not pay, and has not hitherto paid to the defendant the said £40 14s. in cash, or any part thereof; whereupon the defendant demanded the said sheep back from the plaintiff's agent, in whose possession the said sheep and lambs then were, who thereupon re-delivered the same to the defendant, which are the grievances complained of. The defendant likewise counter-claimed as follows: The defendant counter-claims against the plaintiff £43 14s. 2d., for that the plaintiff agreed to buy from the defendant, and the defendant agreed to sell to the plaintiff, 316 sheep and 112 lambs for the price or sum of £156 14s., and to pay for the same £40 14s. in cash, and the balance by his promissory note at 30 days' currency; yet the plaintiff did not pay the said sum of £40 14s. so agreed to be paid in cash for the said sheep and lambs, nor any part thereof, whereby the defendant was compelled to re-sell the said sheep and lambs at a much less price than £156 14s. aforesaid, to wit, £112 19s. 10d., and the defendant counter-claims the difference between the said sum of £156 14s. and £112 19s. 10d., to wit, the sum of £43 14s 2d.

Mr. Bryant, in support: The counter-claim disclosed no cause of action. The application is made on summons under Order XXV., rule 4, and can be made in Chambers (*Padgett v. Binns*, W. N. 1884, p. 10). This is a case within the Statute of Frauds. Before the price is due there must be delivery, part performance or something in writing. If the contract is in writing it should be shown to be so on the pleading. If it was not in writing then delivery must be made. This counter-claim does not show that there was a delivery of these sheep or that the contract was in writing, and is therefore bad. It is not sufficient, when an agreement is relied on, for the party pleading it to state generally, "it was agreed," &c., he must also, in order to comply with Order XIX., state whether the agreement was in writing or not, and generally the facts which support the allegation of an agreement (*Turquand v. Fearon*, 40 L. T. N. S. 543). If there was a delivery of these sheep the defendant had no right to re-sell them, he had only the lien on them of an unpaid vendor.

Dr. Madden, to oppose: The counter-claim is practically for goods bargained and sold, there is no question of lien at all. The plaintiff did not pay, and the defendant resold the goods—it is not alleged that the plaintiff took possession of the goods. On the supposition that the goods were paid for they were handed over; the money was not paid, so there was only a conditional delivery. If the money was not paid there can only be a conditional delivery (*Bishop v. Shilletol*, 2 B. & Ald. 329). There is no rule which provides that where a contract is in writing it has to be so stated in the pleadings. Order XXV., rule 4, seems to provide that applications of this nature should be made either to a judge sitting as a Court, or to the Full Court.

His Honor said: This was an application, under Order XXV., rule 4, to strike out paragraph 1 of the defendant's counter-claim, on the ground that it discloses no cause of action. The Order XXV. is entitled, "Proceedings in lieu of demurrer." In the case of *Burstall v. Beyfus*, Selborne, L.C., at p. 38, says: "Demurrers are in form abolished; but Order XXV. takes notice of three forms, in which the object of demurrers may be obtained. First, by raising on the pleadings a question of law, so that the parties may have it decided quickly; secondly, by raising the question on a pleading whether it discloses any reasonable cause of action or answer, in which case the Court may order the pleading to be struck out, not necessarily disposing of the whole action; and, thirdly, in case an action or defence is shown by the pleadings to be frivolous and vexatious, then the Court or a judge can dismiss the whole action, or order it to be stayed, or judgment to be entered accordingly, as may be just." This application, so far as the first portion is concerned, rests on the second of the above grounds. I think the words of this ground have nearly the same effect as the rule in the Common Law Procedure Statute, by which general demurrers were to be determined. This counter-claim, although it may not be strictly good in form, is good in substance; it sets up an agreement which is in the nature of goods bargained and sold, which is a good cause of action. In the alternative the plaintiff applies that this counter-claim may be struck out on the ground that it is embarrassing; now this is not the proper form of application, though it is one which is very generally used. The proper ground for making this application is that the pleading will embarrass the fair trial of the action. I do not think that this pleading is calculated to embarrass the fair trial of the action, nor do I think that it can embarrass the plaintiff in pleading. I therefore dismiss the summons with costs, to be taxed.

Solicitors: For plaintiff, *Davies, Price*, and *Wighton*; for defendant, *Bennett, Attenborough, Wilks*, and *Nunn*.

May 16.

Whiteley v. The Riverina and Echuca Red Gum Company, and L. Ellis, Sherriff Garnisher.

Rules of Supreme Court, 1884, *Order XLV., r.* 1 —*A surplus remaining in the sheriff's hands after seizure and sale, and satisfaction of the*

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judgment creditor's claim under the execution is a "debt" owing by the sheriff to the judgment debtor, and can be attached.

Garnishee summons by a second judgment creditor, by which it was sought to attach the surplus proceeds in the hands of the sheriff, after a levy and sale under an execution.

MR. FORLONGE, for the judgment creditor, mentioned the cases of *Harrison v. Paynter*, 6 M. & W. 387; *Wood v. Wood*, 4 Q. B. 397; *Murray v. Simpson*, 8 (L.) C. L. R. App.

MR. BRAHAM, for the garnishee, stated that he did not appear to oppose the summons, but to take the opinion of the judge as to whether, having regard to the case of the *Oriental Bank Corporation v. Grant*, 1 W. & W. (L.), p. 16, surplus proceeds in the hands of a sheriff after a levy and sale under an execution could be attached by a second judgment creditor, and he also asked that, on account of the importance and novelty of the application, costs of professional advice be allowed to the sheriff.

HIS HONOR said: The only difficulty in this case is suggested by the decision of this Court in *The Oriental Bank Corporation v. Grant*, 1 W. & W. (L.) p. 16, in which it was held that surplus proceeds in the hands of the sheriff after a levy and sale under an execution, could not be attached by a second judgment creditor, under the Common Law Practice Act, sec. 179. That section corresponds with sec. 201 of the Common Law Procedure Statute, 1865, down to the proviso in the latter statute, except that it makes liable to attachment "moneys" of the judgment debtor in the hands of the garnishee, and not, as in the later enactment and also in the new Rules of Court, Order XLV., rule 1, "all debts" owing or accruing from the garnishee to the judgment debtor. The decision is no longer applicable to the law as it stands at present. A surplus remaining in the sheriff's hands after seizure and sale, and satisfaction of the judgment creditor's claim under the execution, is undoubtedly a "debt" owing by the sheriff to the judgment debtor. (*Harrison v. Paynter*, 6 M. & W. 387). It is, consequently, now liable to be attached. The order will go for the payment of £144 1s. 5d., the amount in the sheriff's hands. In the circumstances of the case, I think that the sheriff may be allowed costs of appearing by his legal adviser. I fix these, by consent, at one guinea.

Solicitors: For judgment creditor, *Highett* and *M'Laughlin*; for garnishee, *Braham* and *Pirani*.

SITTINGS IN BANCO.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

March 12, May 4.

HIGGINS AND WRIGHT v. THE VICTORIAN RAILWAY COMMISSIONERS.

Railways (Commissioners 1883) *(No.* 767*), s.s.* 2 40, 44, 56, 59, 61, 71—*Liability of Railway Commissioners upon a contract entered into with the Board of Land and Works—Certificate of Engineer-in-Chief determining the contract—Power of Engineer in-Chief to determine the contract—Arbitrators—Power to appoint arbitrators after determination of contract—Jurisdiction of arbitrators—Award—Award a nullity—Costs.*

This was an application to compel the Victorian Railway Commissioners to pay a sum of £12,725 found by arbitrators to be due by them to the plaintiffs under a contract by the plaintiffs with the Board of Land and Works for the construction of the railway between South Yarra and Oakleigh. The contract was entered into in 1879, and after it had been proceeded with for some months the engineer-in-chief caused it to be terminated, as he contended he had a right to do because the contractors did not make sufficient progress with the works. Some months ago the contractors, also claiming to act under the contract, gave notice to the Railway Commissioners, which body had been created in place of the Board of Land and Works to manage the railways, stating that they had appointed one arbitrator to act for them in the dispute they had with the department relative to the contract, and stating that in the event of the Commissioners not appointing two arbitrators, as they were empowered to do by the contract, they (the plaintiffs) would appoint two to act. The Commissioners did not appoint any arbitrators, and the plaintiffs then appointed two to act with the first one that they had nominated. The Commissioners then sent a representative to the arbitration under protest. The arbitrators, after taking evidence, decided to award the plaintiffs £12,725 for the work they had done, and for the loss they sustained by the interference of the Government with the execution of the work. Plaintiffs applied to enforce payment of the award, and the defendants sought to set it aside, on the grounds that the Board of Land and Works, and not they, should have been proceeded against, and also that under the contract the arbitrators were not properly appointed, and that the award was bad.

DR. MADDEN, MR. HODGES, and MR. HIGGINS for the plaintiffs; MR. WEBB, Q.C., and MR. BOX for the defendants.

MR. JUSTICE HIGINBOTHAM, in giving the judgment of the Court, said: These were cross motions, the one for an order to enforce performance by the Victorian Railway Commissioners of an award of arbitrators, which had been made a rule of Court, in favour of J. F. Higgins and Co., for payment of the several sums of £12,775, £250 costs of reference, and £680 17s. costs of the award; and the other to set aside the same award, on the grounds that the contract containing the submission to arbitration had been lawfully determined prior to entering upon the matters of the reference, that no submission to arbitration existed between the parties, and that the arbitrators had no jurisdiction whatever

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to enter upon the reference. The contract on which the submission to arbitration was founded had been made on September 24, 1878, between J. F. Higgins and Co. and the Board of Land and Works, for the construction of a portion of the Gippsland line of railway. The works were to be completed by April 24, 1879, but the contractors, who complained that possession of the whole of the ground was not given to them in due time, failed to complete their contract at the date specified, and, after various communications between them and the engineer-in-chief, the Board of Land and Works, by an instrument under seal delivered to the contractors, determined the contract on June 14, 1879. In 1884, on March 12 and June 24, the contractors proceeded, under the 87th and 88th conditions of the contract, to appoint arbitrators, before whom the Railway Commissioners, who had then succeeded to the Board of Land and Works in the management of the State railways, appeared by one of their officers, and also lodged a formal protest. This course was taken with the assent of the arbitrators and of one of the contractors. It was conceded in the argument that the Commissioners had not, by appearing before the arbitrators, waived any right of objection. *Davies v. Price*, 34 L. J., Q. B., p. 8, and *Ringland v. Lowndes*, 17 C. B., N. S., p. 514, were cited on this point. The arbitrators made and published their award, directing payment of the sums above-mentioned on October 1, 1884. The first question which we have to determine is whether the Railway Commissioners were legally liable to the contractors upon a contract entered into with the Board of Land and Works, so that the award could be made or enforced against the commissioners. By the Act No. 767, which came into full operation in February 1, 1884, the State railways, which had previously been vested in the Board of Land and Works, were vested in the Railway Commissioners (secs. 2 and 40). The power of supervision (sec. 56), and of making bye-laws for the management of the State railways (secs. 2 and 44) was likewise taken away from the Board and given to the Commissioners, who were also empowered to construct and maintain all authorised lines of railway (sec. 61), and to control and manage all moneys appropriated by Parliament for the construction, maintenance, or management of the railways (sec. 59). By section 71 it is provided that all contracts entered into before the passing of the Act by the Board of Land and Works in connection with the railways shall be as binding and of as full force and effect in every respect against or in favour of the Commissioners, and may be enforced as fully and effectually as if instead of the Board of Land and Works the Commissioners had been a party thereto. It has been argued for the Commissioners that under these words they would only be liable for breaches of contracts entered into by the Board of Land and Works committed by the Commissioners after the Act No. 767 came into operation. We do not concur in this view. We think that the language of the Act is amply sufficient to cover all claims and causes of action, past or future, arising under any contract entered into by the Board of Land and Works, and subsisting at the time the Act No. 767 came into force. The construction contended for would operate most unjustly if the Board of Land and Works, from which its property and means of satisfying claims established against it are taken away by the Act, were saddled with the liability for breaches of contracts the full benefit of which contracts had passed to the newly-created body. We entertain no doubt that if this contract had been a subsisting contract, so as to be capable of being referred to arbitration, the Railway Commissioners would be bound to perform an award lawfully made in accordance with the conditions of the contract. In the next place it was strongly urged on behalf of the contractors that the contract had not been lawfully determined, and that the arbitrators, therefore, were lawfully appointed, and had jurisdiction to enter upon and to determine the matters referred to them in accordance with the terms of the contract. This question turns upon the construction of the 81st of the conditions of contract under and subject to which the works were to be executed, and which each party covenanted with the other to perform, fulfil, observe, comply with, and submit to. The 81st condition deals with the subject of the progress of the works. The first paragraph of the condition enables the engineer-in-chief to enforce by various means due expedition in the construction of the works. The second paragraph provides for the determination of the contract by the Board in certain cases, and declares what shall be the effect and consequences of such determination. The precise meaning of this second portion of the condition will best be made apparent if the terms are distributed into their proper divisions and subdivisions. We think that three classes of cases are contemplated in which the board shall have power to determine the contract; that the first class contains four subdivisions, and that the whole should be read and construed as if it were written as follows:—"1. If the contractor (*a*) shall, in the opinion of the engineer-in-chief, fail to make such progress with the works as the engineer-in-chief shall deem sufficient to insure their completion within the specified time; or (*b*) shall, after the specified time has elapsed, have not made proper progress with such works; or (*c*) shall use or employ bad or insufficient material; or (*d*) execute any work in an imperfect manner; and shall (in any of such cases) fail or neglect to rectify any such cause of complaint for seven days after being thereunto required in writing by the engineer-in chief. Or, 2, if the contractor shall, in the judgment of the engineer-in-chief, commit a wilful breach of his contract. Or, 3, if any of the works in the specification, or in any of the drawings, or any

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extras, additions, enlargements, deviations, or alterations thereto or therein shall be carried on or done on any Sunday without the written permission of the engineer-in-chief, previously obtained then, and in any of such cases, it shall be lawful for the Board," etc. The power of the Board of Land and Works to determine the contract is thus called into existence only in certain specified cases; except in some one or more of these cases the power is not given, and cannot, of course, be exercised. The actual determination of this contract by the Board on June 14, 1879, was founded upon the following certificate of the engineer-in-chief, dated June 12, 1879:—"To the Board of Land and Works.—Contract No. 1,117, entered into between Joseph Fielding Higgins, and Andrew Wright with the Board of Land and Works, for the formation of a portion of the Gippsland Railway, from South Yarra to Oakleigh. I, Robert Watson, of Melbourne, engineer-in-chief for the time being of the Victorian Railway Department, do hereby certify that, *in my opinion*, the above-named Joseph Fielding Higgins and Andrew Wright, have not, after the specified time for completing the works of the above contract had elapsed, made proper progress with such works, and that I have complained to them of such want of proper progress, but they have failed to rectify such cause of complaint for seven days after being thereunto required in writing by me. And I further certify that, in my judgment the said Joseph Fielding Higgins and Andrew Wright have also committed a wilful breach of the above contract by their neglect to complete the works of the said contract before this day. Dated, 12th day of June, 1879.—ROBERT WATSON, Engineer-in-chief." It has been contended for the contractors that this certificate, that the contractors had not, in the opinion of the engineer-in-chief, made proper progress, is not sufficient, that the fact that proper progress had not been made must be alleged and established by proof, and that the engineer-in-chief's opinion about the fact is not enough to warrant the board in determining the contract. We think that this contention is correct. The words "in the opinion of the engineer-in-chief" are not repeated in sub-division B of division 1 above set forth, and the use of the word "shall" in that sub-division and the grammatical construction of the sentence seem to forbid the implied repetition of them. We cannot imagine the reason for omitting them in this place, but we are bound to suppose that some good reason existed, and we must give effect to the plain meaning of the words employed by the parties. The making a complaint by the engineer-in-chief, and the failure by the contractors to rectify the cause of the complaint made would be unavailing if the cause of the complaint stated in the condition did not exist, or was not shown to exist. Proper progress may have been made with the works after the specified time elapsed, although the engineer-in-chief may have been of opinion that it had not been made, and had founded a complaint upon such erroneous opinion; and the contractors would not be bound to rectify this cause of complaint, based upon opinion only, unless the opinion was, and could be proved to be, in accordance with the fact. This portion of the certificate, therefore, is insufficient, in our opinion, to support the determination of the contract by the Board. But the engineer-in-chief further certified that, in his judgment, the contractors had committed a wilful breach of their contract by their neglect to complete the works of the contract before the date of the certificate. It has been argued that there can be only one wilful breach of the contract on which the engineer-in-chief can certify, namely, neglect to carry out the instructions in the written notice mentioned in the first paragraph of the 81st condition. But the language of the condition does not support this view. "A breach"—that is to say, we think, "any breach," not "the breach above-mentioned"—may be, in the judgment of the engineer-in-chief, a wilful breach of the contract, and therefore sufficient ground within this condition for determining the contract. The first part of this 81st condition does not purport to limit wilful breaches of the contract to the particular case of the wilful breach there mentioned. It appears to have been the object of the contracting parties, by making failure on the part of the contractors to carry out instructions within seven days after written notice a constructive wilful breach of the contract, to enable the engineer-in-chief to insure sufficient progress of the works, either by employing workmen and providing materials himself, or by procuring an absolute determination of the contract. With this view he is expressly empowered to declare that to be a wilful breach which he may know not to be really a wilful breach of the contract. But there may be also breaches of contract which in his judgment are not constructive only, but actual wilful breaches, and in the case of any such breach the contract may, we think, be determined under division 2. The breach here certified to be wilful in the judgment of the engineer-in-chief is the neglect on the part of the contractors to complete by June 12, 1879, the works which by the terms of the contract ought to have been completed by April 24, 1879. We think that this certificate furnished a good and sufficient ground to the Board for absolutely determining the contract; and if the contract was determined by the Board under circumstances which make the determination valid and effectual, all claims and demands under the contract are to be deemed to have been satisfied by previous payments, and there remained nothing in connection with the extinguished contract which could be referred to and dealt with by arbitrators. The conditions providing for arbitration ceased, in our opinion, to have force or to be capable of being put in operation at the same time that the contract was determined; neither party had power to appoint

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arbitrators, and arbitrators, if appointed, had no jurisdiction to act. A view opposed to this had been strongly pressed upon us. It had been contended that even if this contract was, in fact, properly determined, not only might arbitrators be appointed who could award and determine upon any dispute that could be referred to arbitrators under the contract, but that their award, although clearly erroneous and in excess of their jurisdiction as dealing with matters which could not be referred to them, is, nevertheless, binding and conclusive, and that this Court cannot set it aside, but is bound to enforce it. We think that this view is wholly untenable. It is true, as has been noticed in the argument, that it was the actual as well as the apparent intention of the framers of these general conditions of public contracts to oust the jurisdiction of the courts of law. This may be a perfectly legitimate object, and if parties choose to determine that they will have a domestic forum instead of resorting to courts of justice, a *prima facie* duty is undoubtedly cast upon courts and judges to act upon and give effect to such an agreement (see *per* Lord Selborne, L.C., in *Willisford v. Watson*, 8 C. A., at p. 480). Questions requiring for their determination the exercise of professional judgment or involving the minute and protracted examination of numerous or intricate accounts cannot be satisfactorily determined by a jury in a court of justice. Accordingly in this, as in many other contracts for the construction of extensive public works, provision has been made, and we venture to think wisely made, for the adjustment of doubts, disputes, and differences by a domestic forum, consisting either of a professional officer of high rank and qualifications or of arbitrators chosen by the parties. But neither the engineer-in-chief nor the arbitrators have any jurisdiction at all except under and subject to the contract and while the contract is subsisting. So long as the contract continues to exist the jurisdiction and functions of the engineer-in-chief and of arbitrators, if arbitrators be appointed, are entirely distinct. By condition 87, doubts, disputes, and differences are to be referred to arbitration, "subject to the powers hereinbefore given to the engineer-in-chief, and only in respect of such matters or things not hereinbefore left to his decision, determination, settlement, direction, or assessment, or to be governed by his certificate." Differences concerning the meaning or intention of the contract, or of the specification or conditions of contract, can only be referred to arbitration subject to the same limitation, and arbitrators, even though duly appointed under a still subsisting contract, have no jurisdiction to determine the meaning of such portions of the contract as relate to matters and things to be determined by the decision of the engineer-in-chief. The decisions of the engineer-in-chief and of the arbitrators respectively in the exercise of their separate and distinct functions are absolutely final and binding upon the parties, and neither authority can at the instance of either of the parties interfere with or set aside the acts or determinations of the other authority. This is placed beyond dispute by the language of condition 91, which provides that "all the awards, directions, decisions, determinations, admeasurements, and valuations of the said engineer-in-chief or arbitrators, or any two of them, as the case may be, under any part of this contract, shall be final and binding upon the Board, and the contractor do hereby agree respectively to perform, abide by, and submit to the same. . . . And it shall not be competent for the contractor or the board to except in law or in equity to any hearing or determination before or of the said engineer-in-chief or the arbitrators, as the case may be, on the ground of any want of jurisdiction, or excess of authority, or irregularity of proceeding, or otherwise, howsoever; but any and all matters made the subject of any such hearing, or determination, or decision, and whether of retrospective or prospective operation or effect, shall be held and deemed, both at law and in equity, to have been properly submitted to the said engineer-in-chief or the arbitrators, as the case may be, and to be taken to have been properly adjudicated upon." It appears by the contractors' affidavit of November 20, 1884, that in this case the arbitrators believed that the contractors had made proper progress with the works after the specified time had elapsed, and that there had been no wilful breach of the contract, and that they decided that the contract had been wrongfully cancelled by the Board of Land and Works. These were questions which, assuming this contract to be still in force, as having been wrongfully put an end to, related to powers given to the engineer-in-chief, and involved the determination of matters or things left by the contract to his decision, and they were questions, therefore, which were not referred, and which could not, according to the conditions of the contract, be referred to the arbitrators; and the arbitrators could not, by treating the act of the board as a nullity and deciding upon matters which had not been referred to them, give themselves jurisdiction. But if, as we think, the contract and all its provisions had been previously lawfully determined, the want of jurisdiction in the arbitrators is still more clearly apparent. It is certain that the arbitrators had no jurisdiction to decide whether the contract was or was not in force. When the construction of a contract, as a whole or in part, is left to persons appointed by the parties, it was necessarily implied upon a question arising as to the existence of the contract, that the Court is to have the power to determine that question in the first instance. And if the Court should be of opinion that the contract has been legally determined and does not exist, no questions relating to the construction of the contract can come under the consideration of arbitrators who are themselves the creatures of the contract, and cannot be called into existence after it

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has come to a final end. We need not consider whether the arbitrators in dealing with some of the matters included in items of the particulars on which the award is based have determined upon matters and things to be decided by the engineer-in-chief, or to be governed by his certificate. We are of opinion that the whole of the proceedings in connection with this arbitration, including the appointment of arbitrators and the award, are absolutely null and void. In a case like the present, where the award is a nullity, and any action brought to enforce it must fail, it is not usual for the Court to interfere to set the award aside (*Doc. d. Turnbull v. Brown*, 5 B and Cr. p. 384). For this reason, the motion to set aside this award is refused, but without costs. The motion for an order to enforce payment under the award is also refused, with costs, to be paid by the applicant.

MR. JUSTICE WILLIAMS said: That he concurred, with the result of the judgment, but there was one portion of it to which he could not give his full concurrence—namely, that portion of it which held invalid that part of the certificate of the engineer-in-chief which stated that, in his opinion, proper progress had not been made with works after the specified time for completing the works of the contract had elapsed; that he had complained to them of such want of proper progress, but they had failed to rectify the cause of complaint for seven days after being required to do so. He was was disposed to think the words in clause 81 of the conditions of the contract, "in the opinion of the engineer-in-chief," which were expressly mentioned in and governed the first mention of the second sub-division of clause 81, governed also the second mention of that sub-division, namely, "or shall after the specified time has elapsed, have not made proper progress with such works." He thought the opinion of the engineer-in-chief was to govern the decision upon that fact as well as the decision upon the fact named in the first sub-division, namely, if the contractors "fail to make such progress with the works as the engineer-in-chief shall deem sufficient to insure their completion within the specified time." The engineer-in-chief had admittedly to form an opinion as to the first question, because he was the only person capable of forming an opinion on what must be to a certain extent a matter of opinion, namely, whether sufficient progress had been made with the works within the specified time. So that if sufficient progress was not made in his opinion, he might state that fact, and the Board might thereupon determine the contract. If it was right or necessary that the engineer-in-chief should form an opinion on the first point, it seemed also proper that he should do so on the second point. It was true that to give this construction to the subdivision of clause 81, the word "shall" must be struck out for the grammatical construction of the clause. But it was so clear that the intention of the parties was that the judgment of the engineer-in-chief should be exercised to determine the matter that he had come to the conclusion, though not without some doubt, that this word "shall" was redundant and must be struck out, so as to admit the words "in the opinion of the engineer-in-chief" to govern this portion of the clause. The rule which had been laid down for the interpretation of statutes had been extended to the interpretation of contracts, that when the judicial interpreter was satisfied that an obscure clause as it stood did not fairly express the intention of the parties, and that a suggested amendment did do so, he was at liberty to adopt the suggested amendment, and as the intention of the parties was of judicial interpretation, he ventured to do so in this case. If this view which he had expressed was correct, the decision of the Board of Land and Works could be supported, not only on the ground stated by the judgment just read, but also on the ground that the neglect of the contractors to comply within seven days with the complaint made by the engineer-in-chief enabled him absolutely to determine the contract.

BENNETTS V. AKEHURST. May 4.

Under an agreement not to carry on business for the space of five years under a penalty of £100, and not to start in the same line of business in a radius of eight miles, it was held that the penalty of £100 was to be considered as liquidated damages for the breach of the first part of the agreement; but that as a second part did not contain any penalty, no damages could be recovered unless proved.

Appeal from County Court, Melbourne.

MR. HODGES for the appellant (the defendant); MR. ISAACS for the plaintiffs (the respondents).

The plaintiffs, J. E. Bennetts and J. Roberts sued the defendant, Wm. Akehurst, to recover damages for breach of an agreement. The defendant had carried on the business of a carpenter and cabinetmaker at Prahran. In October, 1883, he sold his business to the plaintiffs for the sum of £156. Among the conditions of sale were these:—"3. The vendor agrees not to start in the same line of business within the next five years under a penalty of £100, and will do all in his power to further the interest of the said purchasers. 4. The vendor agrees not to start in the same line of business in a radius of eight miles." The plaintiffs alleged that the defendant had broken the conditions of the contract under which they bought by entering into competition with them by starting in the same line of business within five years of the sale to them, and also within eight miles of Prahran. The defendant asserted that the business which he had done was not in competition with the plaintiffs; that the business he had sold to them was that of carpentering, and what he had done was to take contracts for building houses. Judge Cope found on the evidence that the defendant had

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entered into competition in the same line of business with the plaintiffs, and gave a verdict for them for £100. The defendant appealed. It was contended for the appellant that the evidence showed that the defendant had not carried on the business of a carpenter since the sale to the plaintiffs, but that of a contractor; and that as to damages there was no provision for payment of any sum as liquidated damages for having commenced the same business within a radius of eight miles of Prahran, and the plaintiffs before they recovered any substantial damage on that ground should give evidence of what they had lost by the competition of the defendant. As to the sum of £100 mentioned in the third condition of sale, that condition was illegal, as it was in restraint of trade, as it might mean that the defendant was not to carry on business anywhere for the period mentioned in it. In reply to the last objection, it was contended that it could not be taken at this stage; the defendant had not relied on illegality at the trial in the County Court, nor as one of the grounds of appeal.

MR. JUSTICE HIGINBOTHAM said that the Court was of opinion that the appeal should be dismissed. The contract between the parties was that the defendant should not start in business for five years under a penalty of £100, and by a second stipulation it was agreed that he should not start in the same line of business as the plaintiffs within a radius of eight miles from Prahran. There was evidence that after the agreement was made the defendant did, within a radius of eight miles and within five years, start in the same line of business, that is to say, he went into competition with the plaintiffs in the same line of business. It was also proved that he did himself do carpenter's work, and the judge of the County Court had found as a fact that the defendant did do carpenter's work, and did it in the course of carrying out contracts which he took, and thereby committed a breach of the agreement. Then the question arose—a breach of what agreement? If it was a breach of agreement not to start in the same line of business within a radius of eight miles, then, inasmuch as there was no provision for a penalty connected with that stipulation, the plaintiffs would not be entitled to recover damages except such as they could prove they had sustained through the breach of the contract. They had not proved any damage under that clause. But another stipulation of the contract provided for a penalty of £100 in order to prevent a particular Act—namely, the defendant starting in the same line of business within a period of five years. Then, was that sum to be regarded as a penalty or as liquidated damages. The Court was of opinion that the amount should be regarded as liquidated damages. It was said that the provision restricting the defendant from carrying on business for five years was unreasonable, and was therefore illegal. But inasmuch as that defence was not raised in the County Court, although the defendant was called on to state his defence, and as the point was not taken on the application for a new trial, it could not now be brought forward. The question of the illegality of the condition did not, therefore, now arise, as the defendant was not in a position to contend it was illegal. The plaintiffs were entitled to recover the £100 mentioned in the contract, and the appeal would be dismissed.

May 4.

THE BUZOLICH PATENT DAMP-RESISTING COMPANY v. LUPLAU, SAME v. ST. PAUL, SAME v. CORNWELL.

Appeal from County Court—New trial—Opinion of judge of inferior Court erroneous.

These were appeals by the plaintiff company against a decision of the judge of the County Court, Melbourne, nonsuiting the plaintiffs. The actions were brought to recover sums due for calls on shares held by the defendants in the plaintiff company. At the trial in the County Court Judge Cope held that the company should, by the articles of association, have forfeited the shares before suing for calls, and therefore nonsuited the company, which appealed.

MR. HODGES and MR. ISAACS for the appellants; MR. WALSH and MR. GOLDSMITH for the respondent.

MR. GOLDSMITH said that the respondents did not mean to contend that the decision in the County Court was right for the reason given by the judge, but enough evidence had been given at the trial to show that the decision was right on other grounds; that, in fact, the call had not been properly made.

MR. HODGES said that the judge had practically stopped the plaintiffs in their case, for he said that no matter what evidence was given, he should hold that the plaintiffs must be nonsuited, as they had not forfeited the shares. As the plaintiffs had yielded to the judge's opinion on a point of law which was now admitted to be erroneous, there should be another trial.

THE COURT held that there should be a rehearing of the case before a judge of the Supreme Court, and that all the parties should bear their own costs of the proceedings till the present time.

May 4.

M'LAUGHLIN (APPELLANT), CALL AND OTHERS (RESPONDENTS.)

Police Offences Amendment Act 1876 *(No.* 532), *sec.* 1—*Gaming at any game or "pretended" game of chance—Meaning of the word "pretended."*

This was a special case stated by the General Sessions, Melbourne, on an appeal by one Robert M'Laughlin, against a conviction by the justices in petty sessions. M'Laughlin was summoned under section 1 of the Police Offences Amendment Act No. 532, which provides that "every person playing or betting by way of wagering or gaming in any

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street, road, highway, or other open and public place, or in any open place to which the public, whether upon or without payment for admittance, have or are permitted to have access at or with any table, instrument, or means of wagering or gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, *at any game or pretended game of chance*," shall be liable to a penalty. M'Laughlin was convicted of playing at a "pretended game of chance" at the Flemington racecourse on the 4th November last. The evidence against him was that the prisoner and another man named Lascelles were on the flat at the racecourse. They had a revolving disc marked with the letters of the alphabet. The game was for them to collect from the public 26s., giving a ticket representing each shilling and each ticket bearing a letter corresponding to those on the disc. When the disc was revolving, Lascelles would fire a pin from a gun at it. The holder of the ticket corresponding with the letter which the pin would strike received 20s., and the balance of 6s. would be retained by M'Laughlin and Lascelles. A constable of police, however, swore that he had heard M'Laughlin cry out that a winner was to receive 5s. only. He noticed that Lascelles could stop the disc in such a way as to prevent anyone seeing what letter the pin struck. The question reserved for the Court was whether on this evidence the conviction could be sustained.

MR. CHOMLEY appeared in support of the conviction. There was no appearance for the prisoner.

MR. CHOMLEY conteded that the conviction was good. The prisoner was convicted of playing a "pretended game of chance." By that was meant a game that was held forth as a game of chance; it did not necessarily follow that it was falsely played. But even if it was necessary to prove fraud there was evidence in this case that M'Laughlin had been guilty of fraud.

THE COURT held that the conviction was right. The game appeared to consist in firing a pin at a revolving disc, revolving so rapidly as to make it impossible to calculate what portion of the disc would be struck by the pin, and holders of cards would be unable to guess what part of the disc or what letter would be struck by the pin. It was evidently held out to be a game of chance by the persons conducting the game. The word "pretended" in the Act must have its original meaning "to hold forth," not necessarily falsely. The promoters of this game held it forth to be a game of chance.

TAYLOR V. BROWNING. May 4.

Where the defendant owned certain land on which were houses and there was a water-pipe passing through other land of the defendant, and supplying such houses from the road, and the defendant after the sale of such houses to the plaintiff cut off such pipes so as to deprive the plaintiff of water—Held, *that this was a reasonable easement and passed to the plaintiff.*

Appeal from County Court, Melbourne.

MR. DUFFY for appellant; MR. LEON for respondent.

The plaintiff sued the defendant for damages caused by his wrongful obstruction and diversion of water flowing from a Yan Yean pipe at South Yarra, to a house of the plaintiff's in Athol-street. The judge gave a verdict for the defendant, and the plaintiff appealed.

MR. JUSTICE HIGINBOTHAM said: This was an appeal from the decision of a judge of the County Court at Melbourne, by which judgment was directed to be entered for the defendant. The plaintiff's cause of action was the alleged wrongful obstruction and diversion of water flowing through an underground pipe, connecting the Government water main in Punt-road, South Yarra, with houses of the plaintiff, situated in Athol-street, and wrongfully obstructing the plaintiff's use of the said water. The defendant was originally the registered proprietor of the plaintiff's land, together with his own, the whole being held in one piece or parcel. On March 7, 1883, the defendant sold and transferred a part of his land with two houses upon it to a Mrs. Taylor, who sold and transferred the same piece to the plaintiff before the commencement of the action. Prior to the sale to Mrs. Taylor the houses were supplied with water from the Yan Yean reservoir by a pipe from the main in Punt-road, which ran through the land retained by the defendant, and adjoining the road. The defendant in March, 1884, plugged the pipe passing through his land, and this constituted the wrong complained of by the plaintiff. When the case first came before this Court on appeal in December last, it was suggested for the defendant and respondent that it had been admitted at the trial in the court below that the pipe had burst, and that that was the reason why it had been plugged by the defendant. The case having been remitted, in consequence of this suggestion, to the learned judge of the County Court, we have been informed by him that no such admission was made. The case must, therefore, be dealt with on the assumption that the plugging of the pipe was the voluntary act of the defendant done in the assertion of an alleged right, and the question now to be determined is, had the defendant the right to stop the water as it passed from the main outside his land through the pipe on his own land to the plaintiff's houses? We are of opinion that he had no such right. The following, together with other cases, were cited and commented upon in the course of an extremely good argument, addressed to us by Mr. Duffy for the plaintiff, and Mr. Leon for the defendant: *Nicholas v. Chamberlain*, C.J., p. 121; *Pyer v. Carter*, 1 H. and N., p 916; *Suffield v. Brown*, 4 D. J. and S., p. 185; *Watts v. Kelson*, L. R. 6 Ch. 166; *Polden v. Bastard*, L. R. 1 Q. B. p. 156. The

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apparently conflicting opinions expressed in these cases were reviewed, and a consistent legal doctrine upon this subject was laid down in the more recent case not cited at the bar of *Wheldon v. Burrows*, 12 C. D., p. 31. The following extract from the masterly judgment of Thesiger, L. J., illustrating the distinction between an implied reservation and an implied grant, appears to us accurately to represent the whole of the decisions, excepting only *Pyer v. Carter*, 1 H. & N, p. 916—bearing upon the question to be determined in the present case :—"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is that on the grant by the owner of a tenement of part of that tenement, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that if the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant.

Those are the general rules governing cases of this kind. But the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exceptions which attaches to cases of what are called ways of necessity, and I do not dispute for a moment that there may be, and probably are certain other exceptions. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense—viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation, and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by, and which is to be attributed to Lord Westbury in *Suffield v. Brown*, it appears to me that it has existed almost as far back as we can trace the law upon the subject,"pp. 49-50. It deserves to be mentioned that Lord Justice James, who in *Watts v. Kelson*, L. R. 6 C., at p. 171, had said, "I also am satisfied with the decision in *Pyer v. Carter*," was a member of the Court which, in this latter case, distinctly disapproved of the doctrine propounded in *Pyer v. Carter*, to the effect that there was no distinction between an implied reservation and an implied grant. The application of the first of the two general rules above stated to the facts of the present case is plain and easy. At the time the defendant sold the piece of land, which afterwards became the property of the plaintiff, that piece had a right to the water from the main as a continuous and apparent easement connected with it, an easement necessary for the reasonable enjoyment of it, and which had been, and was at the time of the first sale and transfer of that piece of land, used by the defendant as the owner of the entirety, for the benefit of the piece sold and transferred. That easement therefore passed to the transferee, and the defendant could not afterwards, by his voluntary act, derogate from his grant to the detriment of the plaintiff, who claimed under the grantee of the defendant. We are of opinion that the judgment of the learned judge of the County Court was erroneous, and that the appeal should be allowed, with costs, both of the appeal and of the reference back to the County Court. The case will be reheard before a judge of this Court. The question of the cost of the summons heard by me on 23rd January, 1885, was reserved pending this appeal. These costs must be paid by the defendant.

Appeal to be allowed. Case to be reheard before a judge of the Supreme Court.

Exparte MOURITZ. May 1.

Justices of the Peace Statute 1865, *sec.* 48—*Prohibition—Set-off—Justices cannot recognise items in a set-off relating to claims for breach of contract; nor on accounts stated, not claims in such set-off for work and labour unless such claims arose within* 12 *months before the complaint was made.*

Order *nisi* to prohibit the justices at Warragul from enforcing an order for payment of a sum of £5 17s. 6d. in a complaint of *Witton v. Mouritz*. The complaint, which was brought on the 21st November, 1884, was for goods sold and delivered. The defendant admitted the claim, but put in a set-off for the sum of £14 15s. The set-off was made up of various items of work and labour done from the 10th to the 24th October, 1883, amounting altogether to about £5 10s., and other sums for breach of contract and for money due on an account stated. As to these last items the justices had no jurisdiction to adjudicate. But as to the other items, it was urged that as they were for sums due more than twelve months before the complaint was heard, the justices had no authority to make any order on the complaint. Section 48 of the Justices of the Peace Statute, No. 267, provided that in every complaint in which the defendant is allowed to set-off any debt or demand claimed or recoverable by him from the complainant, such defendant shall be entitled to recover in such complaint the amount, if any, by which the debt or demand so set off exceeds the debt or demand

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claimed and proved by the complainant, and shall have an order for the same accordingly; but, if the debt or demand did not arise within twelve months before the complaint was made, no order whatsoever shall be made on such complaint. The justices decided against the defendant, and made an order for the complainant for the sum claimed. It was sought to prohibit the justices from enforcing the order on the ground that it was improperly made, as some of the items of set-off were due by the complainant more than twelve months before he brought his complaint.

MR. SKINNER moved the order absolute; MR. DUFFY showed cause.

THE COURT remitted the case to the justices to be reheard, with the intimation of opinion that the justices were not to recognise the items in the set-off relating to the claims for breach of contract, or on the accounts stated, and that on the items in the set-off relating to the defendant's claim for work and labour they should ascertain whether those claims arose within twelve months before the complaint was made. If they did so arise, then they could deal with them, and, if they were proved, could set them off against the complainant's claim.

May 1.

Exparte KITCHINGMAN AND MILTON.

Companies (Mining) 1867 (*No.* 324), *sec.* 9—*No action can be brought against a member of an unregistered partnership for mining purposes upon a simple contract made by or with any other member of such partnership on behalf of the same unless such contract or memorandum thereof be in writing and signed by the member sought to be charged.*

Rule *nisi* to quash an order of justices at Bethanga made in a complaint of *Jenkins v. Mansfield, Kitchingman, and Milton.* The complaint was brought to recover a sum of £19 10s. for pyrites supplied to the Murray Valley Pyrites Company, of which the defendants were members. It was heard at Bethanga on the 13th November last, when an order was made for payment of the amount due. An affidavit was, however, filed to the effect that neither Kitchingman nor Milton had been served with a summons to appear at the Police Court, although Mansfield had been served. Kitchingman accidentally heard of the proceedings against him, but Milton did not know of them until after the order was made against him. It was also contended that the order of the justices for payment of the money was bad as against Kitchingman and Milton, inasmuch as they had not given any order for the goods. Section 9 of the Act 324, passed in 1867, provided that "no action shall be brought whereby to charge any member of a partnership, or co-adventure established or to be established for mining purposes, and not registered under the said Act, upon any simple contract made by or with any other member of such partnership or co-adventure on behalf of the same, unless such contract, or some memorandum or note thereof, shall be made or contained by or in writing to be signed by the defendant in such action." In this case the company was not registered, and neither Mr. Kitchingman nor Mr. Milton had signed any memorandum or contract.

MR. WALSH moved the rule absolute to quash the order of the justices. No cause was shown.

THE COURT made the rule absolute, with costs.

A similar application was made to quash an order of the justices at Bethanga against Kitchingman and Milton for £7 11s. 6d., made upon the complaint of W. E. Robinson. The circumstances were the same as in the other case, and the Court made absolute the rule to quash the order of the justices.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Molesworth.)

HOWELL v. HARDING. April 9.

Voluntary settlement—Husband and wife—Where a husband having made a voluntary settlement of certain property on his wife, sold this property after the death of his wife, having taken out administration to her estate. Held, *that the land so settled is part of the assets of the wife, and that the husband, as administrator, is accountable to the next-of-kin of the wife for the value of such property.*

This was an action brought by Mr. W. S. Howell, a brother and one of the next-of-kin of Mrs. Harding, who had been wife of the defendant, Mr. Silas Harding, seeking to have her estate administered, and claiming to be entitled to a share of it. In 1878 Mr. Harding executed a voluntary settlement upon his wife of some land in the Western district. Mrs. Harding died about two years ago. Mr. Harding after her death sold the property to a nephew of his, Mr. Tangye, and claimed that this had the effect of setting aside the settlement. The plaintiff contended that Mr. Harding was bound to answer to the next-of-kin for the value of the property, and the plaintiff's share of it was one-fourth.

MR. HIGGINS and MR. TOPP for the plaintiff; MR. WEBB, Q.C., and MR. A'BECKETT for the defendant, Mr. Harding; MR. CAMPBELL for another defendant, Mr. R. Howell, another brother of Mrs. Harding's.

HIS HONOR, in giving judgment, said: On December 3 (reported in the *Argus*, December 5, 1884) I expressed my opinions, undecided, in this case as to the liability of the defendant to account to his wife's personal representatives for the value of two estates which he voluntarily conveyed to her, and after her death conveyed to his nephew, Mr. Tangye. I directed that the proceedings should be amended so as to raise another question as to his liability upon his covenants in these conveyances, that all persons claiming any estate derived from

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him should convey to the plaintiff as trustee of these deeds. Tangye derives under him, I will say, for this argument, a good estate as provided in the former order. Tangye has been called upon, December 23rd, to convey one set of lands to the plaintiff as trustee of one conveyance, and the other set to the defendant as administrator of his wife. The difference was from a doubt of the covenants passing to the *cestui que* use under the statute of uses, according to the precise terms of the conveyances. And it has been made certain by applications and tenders to them respectively, that Tangye will execute no conveyance of the kind, and that the defendant will not endeavour to induce him to do so. At common law conveyances for the consideration of relationship as husband and wife, and covenants for title, and further assurance contained in them were valid; the very expression "good consideration" showed it. Then came the statute of 27 Elizabeth, which made all voluntary conveyances void against subsequent purchasers for value; and the Courts decided upon this that the purchaser under the second conveyance, having notice of the voluntary conveyance, did not protect the first. But the efficacy of the covenants in the voluntary conveyance, as personally binding the grantor, has never, as far as I can find, been questioned. If a man voluntarily conveyed land to a son with covenants such as here, who held and enjoyed the property, and afterward thought fit to sell it and convey it to another for value, the title of that other would be good. But if the son called on that other to convey to him who refused, he might sue his father for damages. In the case I have supposed general sympathy would be with the son. It may not be so much so here, where the defendant was trying to escape the effect of a voluntary conveyance for his wife, whose property on her death passed to her family, but the legal question is the same. In *Evelyn v. Templar*, 2 B. C. C. 147, a person having executed a voluntary settlement with power to sell, handing the purchase money to the trustees of it, sold to a person having notice of the settlement, received the price, died insolvent; it was held the purchaser was not liable to repay the purchase money to those claiming under the settlement. The purchaser did not purchase as under a power in the settlement, but from the seller selling as owner, and it was held the purchaser could hold as under 27 Elizabeth, and was not bound to regard the settlement. *Pulverton v. Pulverton*, 18 V. 97, never finally decided, went to this—that a person who had executed a voluntary conveyance would not be restrained from executing a conveyance for value inconsistent with it, intending to defeat it. But there (page 91) Lord Eldon referred to the right to sue upon the covenants at law as clear. In *Buckley v. Mitchell*, id. 100, articles to sell for valuable consideration were executed so as to defeat a previous voluntary conveyance, on the ordinary rule, that what is agreed to be done is done. In *Townsend v. Icke*, L. R. 1 C. App. 461, it was held that where a voluntary conveyance is defeated by sale, those having claims under it have no right against the purchase money. In *Williamson v. Codrington*, 1 V. 511, a father conveyed property to trustees for his illegitimate children with words amounting to covenant to warrant. He sold or got value for the land; his representatives were held liable in equity to the value of the property, I may say generally, at the time of the sale. That was on the warranty covenant which the Court of Equity worked out. In *Fletcher v. Fletcher*, 4 H. 67, a voluntary covenant with trustees to settle money on illegitimate children was held enforceable against the covenanter's representatives, and that a Court of Equity would enforce it without regard to the disposition of the trustee by its own machinery. In *Johnston v. Brophy*, 4 V. L. R. (E.) 77, where a person having voluntarily settled land, mortgaged it and other land. I threw the mortgage on the unsettled land to exonerate the settler. This Court is now made the place to enforce both legal and equitable rights. The new Act says that where the doctrine of the two Courts conflicted the doctrine of Courts of Equity shall prevail. Courts of Equity used to refuse to enforce covenants in voluntary conveyances, not as disapproving of them, but as not being the proper tribunal; there was no conflict. As to the measure of damages recoverable, I say that it would be, not as might be on covenants for title, the value of the land when the defendant conveyed to Tangye, but the value of the land when Tangye refused to execute the conveyance, whether the value had increased or diminished. I would not give an option like that in *M'Dowell v. Rowe*, 4 A. J. R. 134. It has been argued for the defendant that it might be inequitable if the land had been improved by Tangye. No case as to such improvement has been raised by pleading or evidence. I shall declare that the plaintiff, as one of the next-of-kin of Mary Louisa Harding, is entitled to have the value of the lands of Chocolyne and Devon Park, comprised in the deeds of December 4, 1878, and February 25, 1879, on December 23, 1884, charged against the defendant, Silas Harding, as part of her assets, for which he is liable as her administrator. Refer to the chief clerk to inquire and certify what the said value was, and also to take the usual accounts of her real and personal estate, and of the plaintiff's right to one-fourth therein, so far as any party may require. Reserve further directions and costs. Liberty to apply.

———— 30th April.

Re THE HOUSEHOLD CO-OPERATIVE SUPPLY ASSOCIATION.

Companies Statute 1864 (*No.* 190), *sec.* 111, *sub-sec.* 3 — *Winding up company—Resolution—Where it is sought to voluntarily wind up a*

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company on the ground that the company cannot by reason of its liabilities continue its business such ground must be distinctly stated in the extraordinary resolution.

This was a motion on behalf of Mr. J. P. Madden and Mr. W. Good, claiming to be liquidators of the Household Co-operative Supply Association, to direct Mr. T. C. Wright, the manager, and Mr. Sayers, the secretary of the association, to deliver up to them the books and the property of the association. There was also a cross application made on behalf of the company in an action brought by it against Messrs. Madden and Good to restrain them from interfering with the company's business.

MR. PURVES and MR. WORTHINGTON appeared for Messrs. Good and Madden; MR. WEBB, Q.C., and MR. WALSH for the company, and for Messrs. Wright and Sayers.

The liquidators claimed to have been appointed at a meeting of the company, at which the following resolutions were said to have been passed:—

"That it has been proved to the satisfaction of this meeting that the company cannot, by reason of its liabilities and the unsatisfactory state of its affairs, continue its business, and it is advisable to wind up the same forthwith."

"That the company be and is hereby placed in liquidation in the hands of James Patrick Madden and William Good, and that they be paid for their services as liquidators a commission of 10 per cent. on the gross assets."

The validity of the resolution to wind-up, and of the appointment of Messrs Madden and Good as liquidators, was questioned on several grounds, but only one point was decided. By the Companies Act, section 111, sub-section 3, it was provided that a company may be wound-up voluntarily "when the company has passed an extraordinary resolution to the effect that it has been proved to its satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind-up the same.

MR. WEBB submitted that the resolution as passed by the company did not comply with the provisions of the section. It gave other reasons for the winding-up of the company than that by reason of its liabilities it was unable to continue business, namely, the unsatisfactory state of its affairs. It was impossible to tell which of the reasons actuated the shareholders in passing the resolution, even assuming that the meeting was a legal one. The resolution was, therefore, invalid.

MR. WORTHINGTON contended that the words in relation to the unsatisfactory state of the company's affairs were mere surplusage, and might be rejected, and that the shareholders had decided to wind-up the company on account of its liabilities.

HIS HONOR said: That no resolution to wind-up the company on any distinct ground had been passed. The resolutions, as adopted, related to the liabilities, and to the state of its affairs. It jumbled up two things. It jumbled up the embarrassment of the company, which would be a good reason for liquidation, with the unsatisfactory state of its affairs, which would be a ground for winding-up under other clauses of the act. The resolution did not distinctly say that the ground for winding-up was the pecuniary embarrassments of the company. The unsatisfactory state of affairs might relate to the directors, and probably that might have actuated a great many of the shareholders in voting for winding-up. A voluntary liquidation such as was contemplated here could only be on the ground of pecuniary liabilities, but it was not so distinctly stated in the resolution as the ground for winding-up. On the contrary, it was mixed up with another ground. He should, therefore, refuse with costs the motion to direct Messrs. Wright and Sayers to deliver up the books and property of the company, and should grant the application to restrain Messrs. Madden and Good from acting or professing to act as liquidators of the company, costs of this application to be costs in the cause.

INSOLVENT COURT.

(Before His Honor Mr. Justice Noel.)

Re ALEXANDER COCKBURN. April 10

Insolvency Statute 1871 (*No.* 379), *secs.* 58, 68. *sub-secs.* 3 *and* 93—*Pension—Where an insolvent is in receipt of a pension not in the nature of half-pay, but one given wholly for past services, such pension passes to the trustees, and is property within the meaning of sec.* 58 *and sub-sec.* 3 *of sec.* 68 *of Act No.* 379.

This was a rehearing of the motion to attach the pension received by Alexander Cockburn, Richmond, tobacconist. An order had been made by Judge Quinlan that £50 should annually be paid over to the trustee from a pension received by insolvent, formerly captain in the Indian army. The Court directed that the £50 was to be applied for the benefit of the estate. With a view to getting the order altered, Mr. L. Woolf appeared on behalf of insolvent, who applied for the rehearing. Mr. Braham represented the trustee, who opposed. His Honor now delivered his reserved judgment.

HIS HONOR said: An application was made so long since as May, 1884, by the trustee in this estate, upon which the Court ordered £50 per annum out of the pension of the insolvent, who was formerly in the army in India, to be paid to the trustee. If that order was deemed invalid or unjust the insolvent might and ought to have appealed. The present motion is no doubt the result of my refusal to make a similar order in *re Perrin* on the 17th October. I think I was wrong in allowing that matter to be reheard, at any rate in allowing a rehearing *ex parte*, for it is very difficult to distinguish between a rehearing of another judge's order and an appeal from such order. But if I should now decide the case upon the propriety of the order for rehearing, the effect would be merely to raise a question of my jurisdiction to rehear, and put the parties to further delay and expense without obtaining a decision upon the real question at

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issue. It will be a better course to state my opinion whether or not the trustee shall continue to receive £50 out of the insolvent's pension. Section 97 is most unskilfully expressed. Unless "such portion" be read "any portion" the first sentence has no termination. I thought I was bound to put a reasonable construction on it if I could, and accordingly, in *re Brooke*, October, 1883, I made an order setting aside a portion of a Victorian pension. It was argued that the section is intended to be an amalgamation of sections 89 and 90 of the Bankruptcy Act, 1869, and so the English decisions on those sections should be applied to its interpretation. It appears to me to resemble much more section 134 of the Bankruptcy Act 1861, for no part of it contains such provisions as section 90 of the Bankruptcy Act 1869. Be this as it may, the section must be construed without reference to sections of a like import, but in different terms, in the English Bankruptcy Act. I am still of opinion that it does not relate to pensions of whatever character, and therefore no more to an Indian pension than to one granted by any foreign Government. Had it been intended to have so wide a scope, I think it would have been so enacted in distinct terms; as in section 101, where, referring to personal no less than real property, elsewhere than in Victoria, the Court is empowered to direct the insolvent to convey by deed the whole or part of such assets. The matter may, however, be regarded from another point of view to which my attention was not called in *re Perrin*. The pension is not in the nature of half-pay, but is given wholly for past services, and, therefore, I take it, passes to the trustee (*Caven v. Cooper*, 33 L. J. C. 289); and, moreover, it seem to be property within the meaning of section 58 and sub-section 3 of section 68. By 58 the order of sequestration vests absolutely in the assignee, the property is defined as money, goods, and every description of property, real or personal, and every description of estate, interest, and prophet, vested or contingent, arising out of, or incidental to, such property. From these words I cannot discern how a sum of money received by the insolvent annually as a right, no matter from what source, can be excluded. If so, each instalment of the pension, when paid to insolvent, vests in his trustee. Whether the pension is assignable or not it is nevertheless property (*ex parte Huggins*, 21 C. D.) Section 97, therefore, if it applied, would be for the benefit of the insolvent, and in limitation of the trustee's rights. As at present advised I shall let the order made on the 13th May last stand. That is to say, I shall not make an order different from, and inconsistent with, it. I observe in *ex parte Wicks*, 17 C. D., the Chief Judge in bankruptcy ordered that the bankrupt after the receipt of the pension should himself pay a certain portion of it over to the trustee. I am inclined to believe such an order might be made here under the general jurisdiction, section 7. My order now is that the trustee continue to receive £50 per annum out of the pension, as directed by the order of May 13.

Re WILLIAM EVANS. April 28.

Insolvency Statute 1871 *(No.* 3), *sec.* 22—*Meeting of creditors—Attorney under power—An attorney under power can appear and vote at a meeting of creditors upon his sworn statement that he is duly authorised to act; the power of attorney need not be produced—Where a creditor consents to a reduction of his claim he may be allowed to be present at a meeting of creditors for a less amount than his claim—An agent of a creditor can value the security held by such creditor.*

HIS HONOR gave judgment in two appeals from the decision of the chief clerk upon affidavits of proof of debt in the estate of Wm. Evans, importer of ironmongery, of 44 Post-office Place.

HIS HONOR said: In the proof of Lazarus, Rosenfield, and Benjamin it was objected that the agent of this firm could not appear and vote at the meeting without producing the power of attorney, giving the agent authority. The chief clerk had overruled this objection, and had allowed the gentleman appointed attorney under power to appear and vote upon his sworn statement that he was duly authorised to act. Section 22 of the Act refers to this. I think the chief clerk was right in doing so, and I hold the affidavit is sufficient. It was further objected that the chief clerk was wrong in admitting a creditor to be present for a less amount than his claim, with the consent of the creditor to the reduction. I hold that the chief clerk's exercise of his power in this direction was correct, and affirm his decision also in this respect. As to the proof of the Monte de Piete Company by their manager, L. M. Myers, it was objected before the chief clerk that the agent had no authority to value the security held by the company. The chief clerk had held that the agent could do this now on the authority of *re Phelan*, 3 W. W. & A'B (1 E. & M.) 1. I affirm his decision. As these points are quite new, I will not give costs against the parties objecting to the chief clerk's decision.

IN CHAMBERS.

(Before His Honor Mr. Justice Molesworth.)

May 14.

HAYES V. WILSON AND ANOTHER.

Rules of Supreme Court 1884, *Order LV., r.* 69—*Mortgage—Voucher—Consideration for mortgage—Affidavit—A mortgage under the Transfer of Land Statute, though subsequently discharged, is not sufficient proof of the exact amount alleged to have been paid as the consideration of the mortgage.*

Application on behalf of the defendants under Order LV., rule 69, for the purpose of taking the opinion of the judge upon certain points arising in the course of the proceeding before the chief clerk

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(*vide* ante, p. 222). It appeared from the evidence heard before the chief clerk that the defendants as trustees of the will of the testator in the cause claimed to be allowed on their accounts for £220, lent on mortgage to one Broadley. In support of the claim a mortgage under the Transfer of Land Statute was proved to have been executed by the mortgagor, but there was no evidence of the actual payment of the money acknowledged to have been lent, nor was there any affidavit by the accounting parties that the money had actually been paid. The report of the chief clerk, disallowing the claim, was as follows:—

1st. The affidavit verifying did not state in the usual form that the payments, etc., set out in the account were actually made, or that the account does not contain any payment, etc., other than such as has actually been made.

2nd. No accounts kept by the trustees were produced, nor was their absence accounted for, although one of the trustees was a solicitor.

3rd. The account shows about 90 similar mortgage transactions, although the personal estate is under £1,300.

4th. No receipt for the amount alleged to have been paid was produced, or its absence excused.

5th. No cheque for the payment was produced.

6th. It was objected to on behalf of the plaintiff that a mortgage under the Transfer of Land Statute should be received as vouching the amount said to have been paid, as the consideration for the mortgage, though subsequently discharged; and that the trust estate can only be charged with the amount actually proved to have been paid.

Defendant's counsel refused to produce any further evidence of the amount actually paid, and declined a postponement for that purpose, which was offered to him. Under the circumstances, I consider that a mortgage under the Transfer of Land Statute, in the form of the 12th schedule, though subsequently discharged, is not sufficient proof of the exact amount alleged to have been paid as the consideration for the mortgage.

This summons was taken out by the defendants, to take the opinion of the judge, upon this ruling of the chief clerk.

Mr. Waterhouse, in support, referred to *Bingham v. Lady Clanmorris*, 1 M. 20, on behalf of the plaintiff; Daniell, sixth edition, p. 1,050, section 778, and *Lodge v. Pritchard*, 3 De G. M & G. 906, were cited in support of the chief clerk's ruling.

His Honor said: Without expressing any opinion as to what evidence should have been produced, I am of opinion that, in the absence of the accounting party's affidavit of actual payment, the mere production of the mortgage, with proof of its execution by the mortgagee, is not sufficient evidence to justify the allowance of the item. I dismiss the summons, with costs to be taxed.

Solicitors: For applicants, *Pavey* and *Wilson*; for plaintiff, *Crisp, Lewis*, and *Hedderwick*.

Flamstead v. Briggs. May 21.

(Before His Honor Mr. Justice Higinbotham.)

Taxation of costs—Review of taxation—Refresher fees to counsel not attending at the trial.

Application on the part of the defendant for a review of taxation. The plaintiff originally briefed counsel to appear for her in this case. Two sittings intervened between the sittings for which the case was originally set down and the sittings at which the trial took place. Shortly before the case came on for trial counsel, finding himself unable to attend to the case through having to attend to a case in another branch of the jurisdiction of the Supreme Court, returned his brief to plaintiff's solicitor with the original fee, but retained the two refresher fees paid to him for the intervening sittings. The solicitor then handed the brief to another counsel with the original fee. A verdict was given for the plaintiff with costs, and the taxing officer allowed as between party and party the two refresher fees paid to and retained by the counsel originally briefed, and attendance on such counsel on such occasions to refresh him. The defendant now applied that these four items should be referred back to the taxing officer for review.

Mr. Isaacs, for the defendant, in support; Mr. Goldsmith, for the plaintiff, to oppose.

His Honor said: This is an application made on the part of the defendant that four items in the plaintiff's bill of costs, which were allowed by the taxing officer, should be referred back for review. The items objected to are two fees to counsel and attendance fees. I am of opinion that the taxing officer was right in refusing to disallow counsel's fees as between party and party, merely because the counsel did not give his attendance at the trial, it having appeared that the counsel was in attendance at the same time at a sitting of the Supreme Court in another jurisdiction, and that his absence was not caused either by his attendance in his professional capacity at any inferior Court or by private business. If the counsel had returned his brief together with his fee and refresher, the case would be different. It now appears that he did not return them, and he was under no obligation cognisable by the taxing officer to do so. One of the affidavits filed on behalf of the plaintiff left this point at first in doubt. I dismiss the summons without costs.

Solicitors: For plaintiff, *Hitchins*; for defendant, *Cleverdon*.

Weigall v. Macpherson. May 21.

Rules of Supreme Court 1884, *Order XXX., r.* 1—*Order XXXI., rr.* 1, 12—*Applications of leave to deliver interrogatories and for discovery ought to be made on general summons for directions—Where a general summons has not been taken out applications of this nature ought to be made* ex parte — *Costs where application is made under a special summons.*

Application on the part of the plaintiff for leave

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to deliver interrogatories to the defendant and for discovery of document.

The action was brought by the plaintiff, as administrator of one Cameron, for money lent by Cameron to the defendant. The defendant pleaded: 1. That Cameron did not, in his lifetime, lend the sum claimed or any other sum to the defendant. 2. That he satisfied and discharged the claim of Cameron by payment to Cameron during his lifetime. The following interrogatories were sought to be administered by the plaintiff to the defendant:—1. Did you not borrow from Cameron the sum of £80 or some other and what sum or sums of money on the 21st March, 1884, or on some other and what day or days within the last six years? 2. Did not the said Cameron, on the 21st March, 1884, or on some other and what day or days, pay to you or to any one on your behalf, by cheque or otherwise, the sum of £80 or some other and what sum or sums of money; and if so what was the consideration for such payment or payments respectively? 3. If you have received from the said Cameron the sum of £80, or any other sum or sums of money by way of loan or otherwise during the last six years, have you ever repaid the same or any part thereof respectively? If yea, state how and on what day or days you repaid the same respectively to the said Cameron? Discovery was also sought of all documents in possession of the defendant which would show that he had repaid the sum claimed to Cameron.

Mr. Leon, to oppose: The 1st and 3rd interrogatories ask in reality whether the defendant's defence is true which is not allowable (*Johns v. James*, 13 C. D. 375). The second interrogatory seeks to obtain the particulars of the defence. The defendant is entitled to tear the plaintiff's case to pieces, but the plaintiff is not in such a strong position against the defendant (*Hoffmann v. Postill*, L. R. 4 C. A. 681).

His Honor said: These interrogatories go directly to the proof of the plaintiff's claim and are clearly admissible. The documents, concerning which discovery is asked for, are such as ought to be known to the plaintiff. This application is made on a special summons for interrogatories and discovery. The practice to be observed in applications of this nature, when not brought under a general summons for directions has been under the consideration of all the judges, and it has been decided that, in cases where a general summons has not been taken out, applications of this nature ought to be made *ex parte*. A special summons ought not to be taken out. This practice ought to be observed in future, for if, after this statement, a party is brought here on special summons by the other party, for leave to deliver interrogatories or for discovery, such summoning party will have to pay the costs of the party so summoned. I grant this application without costs.

Solicitors For plaintiff, *Moule* and *Seddon*; for defendant, *Hart* and *Benjamin*.

Laffy v. Dougharty. May 27.

Rules of Supreme Court 1884, *Order XXIII., r.* 2—*Order XXX., r.* 1—*Application for leave to rejoin — General summons for directions—On applications under Order XXIII., r.* 2 *it is not necessary for the party applying to deliver a copy of the proposed pleading on the opposite party—A general summons for directions should be taken out in all cases—Costs where special summons is taken out for a matter which might have been included in a general summons for directions.*

Application on behalf of the defendant under Order XXIII., r. 2, for leave to rejoin.

In support of the application the previous pleadings were produced, and it was contended that the defendant should have the right to rejoin on those pleadings.

It was contended on behalf of the plaintiff that in applications of this nature a copy of the proposed pleading should be served on the other side before the application is made; that this had not been done in this case, and consequently that the application should be refused.

His Honor said: This is an application by the defendant for leave to rejoin. In my opinion the defendant is clearly entitled to have such leave. It has been contended that the defendant ought to have served a copy of the proposed rejoinder on the plaintiff, but I do not think it was necessary for him to do so. If this application had been made on general summons I should have given the defendant leave to rejoin without costs, but it appears that there was no summons for general directions taken out in this case by either party, and in consequence the defendant must pay the costs of this pleading. It ought to be known that it is admissible, and, in the opinion of the judges, proper, that a summons for directions should be taken out in all cases. This is the cheapest and best mode of dealing with questions that may arise between the parties. My own practice in future will be to impose costs on a party taking out a special summons for a matter which might have been included in a general summons for directions. The defendant will have leave to rejoin on payment of costs, to be taxed.

Solicitors: For plaintiff, *Davies*, *Price* and *Wighton*; for defendant, *Bennett*, *Attenborough*, *Wilks* and *Nunn*.

PRACTICE COURT.

(Before His Honor Mr. Justice Williams.)

Re Nettleton. June 1.

Pharmacy Act 1876 (*No.* 558), *secs.* 13, 14, 15, 25 —Mandamus—*The Pharmaceutical Board of Victoria have no power to erase the name of a registered pharmaceutical chemist from the register for not intimating his change of residence to such Board in accordance with sec.* 14 *of Act No.* 558.

Rule *nisi* for a *mandamus* to compel the

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Pharmaceutical Board of Victoria to restore the applicant's name to the Pharmaceutical Register.

The applicant, Nettleton, was a registered pharmaceutical chemist, and carried on business as such at Winslow, near Warrnambool until the 11th November, 1878, when he was convicted for attempting to procure abortion, and was sentenced to a term of three years' imprisonment. On the 25th August, 1879, the secretary of the Pharmacy Board, while the applicant was still in gaol, wrote the following letter to the applicant addressed to Winslow:—"I beg to draw your attention to the 14th section of the Pharmacy Act. If you do not forward the required information your name will be omitted from the next published Pharmaceutical Register." Section 14 of the Pharmacy Act provides that every registered pharmaceutical chemist, on changing his residence, shall intimate the same to the Board. No answer was received to the above letter, and the Board erased the applicant's name from the register. The applicant, on his release from imprisonment, applied to the Board to have his name restored to the register, but they refused to do so, and the applicant now sought to compel them to do so.

Mr. C. A. Smyth: Section 13 of the Pharmacy Act provides that the Board may from time to time make the necessary alterations in the registration of the qualifications and addresses of the persons registered under this Act, and may from time to time write or cause to be written a letter to any registered pharmaceutical chemist addressed to him according to his last known address, to enquire whether he has changed his residence, and if no answer be returned to such letter within a period of six months from the sending thereof, the Board may erase the name of such person from the Pharmaceutical Register, and may restore the same to such register upon the personal application of such person, and production of his certificate, or satisfactory proof of his former registration. The letter mentioned in this section was posted to the applicant to his last known address, and was not returned, so that it is to be presumed it reached him. The Board were perfectly justified in not allowing the name of a man convicted of the crime this man was convicted of to remain on the register. Section 13 gives a discretion to the Board as to whether they will erase a man's name from the register or not, and consequently they have a similar discretion as to whether they will restore his name or not. If they have this discretion *mandamus* will not lie. In answer to a question of His Honor, Mr. Smyth stated that there was no power given to the Board to erase the name of a man who misbehaves himself in the way this man did. The only power given to the Board to erase the name of and to punish a registered chemist for an offence, is under sections 15 and 25, and the offence for which the applicant was convicted does not come within those sections.

Mr. Fink, to move the rule absolute, was not called on.

His Honor said: The letter the Board ought to have written before they erased the applicant's name from the register is under section 13, inquiring whether he has changed his residence. They, however, wrote under section 14, which gives them no power to erase for not answering. They have proceeded under the wrong section. If the Board had erased the applicant's name on the ground that he had committed an offence under the Pharmacy Act, I should not have interfered with their discretion. If the applicant's name was improperly erased they ought to restore it to the register. I make the rule absolute.

Solicitors: For the applicant, *Fink*; for the Pharmacy Board, *Wilkie*.

SUPREME COURT

Sittings in Banco.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams and Mr. Justice Holroyd.)

Little v. Trotman. May 25.

County Court Statute 1865 *(No.* 345*), sec.* 120—*Nonsuit—Appeal from County Court Misdirection.*

Appeal from County Court at Wangaratta.

Sir Bryan O'Loghlen for the appellant (the plaintiff); Mr. Hodges for the respondent.

The plaintiff, Willis Little, sued the defendant, Joseph Trotman, for breach of an agreement by which the defendant agreed to sell and deliver to the plaintiff 1500 sheep if the plaintiff approved of the sheep. The defendant had placed the sheep with Messrs. Teague and Co. for sale, and Mr. Hassett, as representative of that firm at Benalla, introduced the plaintiff to the defendant as a buyer. Hassett wrote out an agreement in the presence of both parties, dated 5th July, 1884:—"Mr. Little has the offer of Mr. Trotman's wethers until Monday, 7th inst., inclusive, at 9s. 6d., at two months, 10 days to take delivery, and in the event of half of them being taken away at once the balance can remain free of cost for three weeks, and if they remain longer a charge of 1d. per week will be made, but they must not remain longer than four weeks. J. Hassett." On the 7th the plaintiff inspected the sheep, and approved of them, and informed Hassett that he would take them at the price and terms stated, and Hassett, by telegram, so informed the defendant. On the 10th July the plaintiff went to the defendant's farm and claimed the sheep, but was then informed that they had been sold by another party. It was said that the sheep had been sold before the plaintiff had inspected and approved of them. Judge Casey nonsuited the plaintiff, who appealed.

The Court held that it should have been left to the jury to say whether the sheep had been disposed of by the defendant or his agents before the plaintiff inspected them, whether they had been disposed of by the defendant's authority before the

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plaintiff's inspection, and whether that fact had been communicated to the plaintiff.

Appeal allowed. Case to be reheard before a judge of the Supreme Court.

KIRKHAM v. JULIEN. May 8.

Local Government Act 1874 *(No.* 506) *secs.* 295, 296, 299, 301—*Transfer of Land Statute* (*No.* 301) *sec.* 42—*Ejectment—Unpaid rates—Lease by municipal corporation—Notice—The notice required by sec.* 296 *of Act No.* 506 *must be posted before a municipal council can take possession of land for the non-payment of rates—Sec.* 301 *of Act No.* 506 *only requires that the notice of intention to lease should be posted on some conspicuous part of the land taken possession of; it is not necessary where only a portion of the land taken possession of is leased, that the notice should have been placed on the portion so leased. The provisions in sec.* 301 *as to posting notices after taking possession are not a condition to the validity of the lease and do not affect the title of the lessee—Object of sec.* 301—*Sec.* 295 *of Act No.* 506 *passes all the land taken possession of to the municipal council whether such land be under the Transfer of Land Statute or not—A municipal council cannot give a lease under the "Transfer of Land Statute," as it is not the registered proprietor under that Act, and consequently sec.* 42 *of that Act does not apply.*

This was an action of ejectment to recover possession of some land in York-street, Prahran. The plaintiff claimed the property under a certificate of title; the defendant claimed it under a lease from the Prahran Council, which was issued to him under the provisions of the Local Government Act, No. 506. Section 295 of the Local Goverment Act provided that where any rateable property in any municipal district is unoccupied, and the rates thereon accrued under any Act heretofore in force or this Act have been unpaid for five years, the council may in the name of the municipality take possession of such property, and may hold the same as against any person interested therein, and from time to time grant leases of the same, subject to provisions afterwards mentioned. Section 296 provided that the council should not take possession of any such property until one month after notice had been fixed on some conspicuous place on the property, if the name and address of the owner was not known to the municipality. Section 299 provided that out of the rents received by the council the money received should be applied first in payment of the expenses incidental to the execution of the lease and the collection of rents, and next in payment of the arrears of rate and interest, the balance to belong to the owner of the property. By section 301 it was provided that "on taking possession of any property as aforesaid the council shall cause to be affixed upon some conspicuous part thereof a notice that such property has been taken possession of by the municipality under the provisions of this Act, and is to let on lease." It was said for the plaintiff that the council had not fixed the notices on the land which they had afterwards leased, but on another portion of it which formed part of the same block. Mr. Justice Williams, before whom the case was tried in February last, found all the disputed facts in favour of the defendant, but reserved for the Full Court the questions as to the sufficiency of the notices, and their posting on the land; and, secondly, whether as the lease from the council to the defendant was not registered under the Transfer of Land Statute, it was valid as against the plaintiff. Section 42 of the Transfer of Land Statute provided that "no instrument, until registered as in manner herein provided, shall be effectual to pass any estate or interest in any land under the operation of this Act." It was contended for the defendant that the section did not apply in this case, as the municipal council was not the registered proprietor of the land, but was specially empowered to take possession of it by the Local Government Act, and when it took possession the plaintiff had no title as against the council or any person claiming through that body.

MR. WORTHINGTON appeared for the plaintiff; MR. KELLEHER for the defendant.

After MR. WORTHINGTON had been heard,

MR. JUSTICE HIGINBOTHAM said that it was not necessary to call on the counsel for the defendant. There were two points reserved for the consideration of the Full Court. The action was one of ejectment. The defendant was lessee under a lease purporting to be granted to him by the municipality of Prahran, under section 295 of the Local Government Act. The facts in dispute had been found in favour of the defendant, but two questions were reserved for the Court. The first question was as to the sufficiency of the notices posted on the land by the council. One section of the Act required the council before taking possession to post a notice addressed to the owner of the land, or if he was not known, that a notice should be posted in some conspicuous place on the property. That must be done before taking possession. But sec. 296 also provided that a lease granted by the council otherwise in accordance with the Act should be valid, notwithstanding the non-compliance of any of the provisions of the section. But the council had also to post another notice, under sec. 301, after it had taken possession, that it had taken possession of the property, and that the land was to let on lease. It was said for the plaintiff that the notice under this section was not so posted on the portion of the land in dispute in this action. He should be disposed to come to the conclusion on the evidence that a notice had been posted in this case, and that where the council did not know the owner of land, the posting of a notice on any part of that land would be sufficient. The section required that

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a notice should be posted on some part of the land which had been taken possession of. The balance of the evidence led him to the conclusion that the council took possession of the block of land as a whole. I do not think that the provisions in sec. 301 as to posting notice after taking possession was a condition to the validity of the lease. The object of that section was to compel a council on taking possession of land where rates were unpaid, to use all reasonable means to invite competition. In was their duty to inform the public that the land would be leased, and so obtain a sufficient rent as well for the benefit of the absent owner as of the municipality. The provision for affixing notices was to compel the council to secure the highest price for the land. But the fact that they did not give these notices, did not affect the title of the lessee. The section was only a direction to the council to use all reasonable means to procure the best price, and to protect the interests of the absent owner. The second question that had been reserved was whether the lease from the council to the defendant should not have been registered under the Transfer of Land Statute. The land which was taken possession of by the council had previously been brought under the operation of of that Act and it was argued for the plaintiff that inasmuch as the 42nd section of the Transfer of Land Statute provided that no instrument, until registered, shall be effectual to pass any interest in land under the operation of the Act, and as this lease was not registered under the Act, no estate in the property passed to the defendant. I do not think that contention was a good one. It seems to me that the Local Government Act, sec. 295, passed all the land to the municipal council, whether it was under the Transfer of Land Statute or not. The council could not give a lease under the Transfer of Land Statute, as it was not the registered proprietor under that Act. But the Local Government Act did empower it to take the land and grant a lease of it outside the provisions of the Transfer of Land Statute altogether. The council, having power to give a statutory title to the defendant, the plaintiff's title was ousted, and he was not entitled to a verdict.

MR. KELLEHER asked that judgment should be entered for the defendant.

MR. JUSTICE WILLIAMS said that the motion for judgment should be made to him

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Re M'INTYRE. May 11.

Insolvency Statute 1871 *(No.* 379*), secs.* 136, 138, *sub-sec.* 1—*Certificate—Refusal of certificate by judge of the Court of Insolvency—Appeal to Full Court—An appeal lies to the Full Court from a decision of the judge of the Court of Insolvency refusing a certificate under sec.* 136 *of Act No.* 379.

This was an appeal by James M'Intyre, formerly of the firm of M'Intyre Brothers, of Braybrook, graziers, against a decision of Judge Noel in the Insolvent Court, refusing him his certificate of discharge. The firm consisted of three brothers. It became insolvent in 1880. The members of the firm applied in the same year for certificates of discharge, but they were refused on the grounds that debts had been contracted with a creditor without a reasonable expectation of being able to pay them, and also because the insolvents had not kept accounts of the receipts and expenses. A few months ago James M'Intyre, one of the insolvents, applied to Judge Noel for a rehearing of his application, and asked for a certificate, and that the provision in the Act requiring payment of a dividend of 7s. in the £1 before a certificate was issued should be dispensed with. Judge Noel refused both applications, and James M'Intyre appealed.

MR. DUFFY appeared for the appellant; MR. LEON for the opposing creditors.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said that this was an appeal from a decision of the Court of Insolvency refusing a certificate of discharge to the insolvent, James M'Intyre, on the rehearing of his application for a certificate. The certificate was originally refused in the year 1880 (the same year as that in which the insolvency had occurred) upon the grounds that the insolvents had not kept reasonable accounts or entries of their receipts and payments. The application for a certificate was at that time made by James M'Intyre and his two brothers in conjunction, and the charges against the firm were upheld as against all three, and the certificate refused to all of them. The liability of one member of a firm for the acts of other members, in connection with the keeping of accounts and entries of receipts and payments, was a question on which the Court did not propose to give an opinion now. It certainly appeared that it should be dealt with on the facts of each case. It might well be, as a general rule, that a member of a partnership firm was liable for the acts and defaults of his co-partners, and yet that in any particular case if it were proved to the satisfaction of the Court that one partner was not the member of the firm who kept the books, but was engaged in a totally different branch of the business, he should be relieved from liability for the acts of his partners. It was not necessary to decide that question in the present case, because the Court was able to deal with the case on the assumption that the decision of the Court of Insolvency five years ago, by which he was found guilty of these offences, was a proper decision. But the case now came before the Court after five years on a renewed application by the insolvent, James M'Intyre, for his certificate. The learned judge of the Court of Insolvency had stated that his reasons for making the order appealed against was limited to the ground that reasonable accounts or entries were not kept of the receipts and expenditure. But he also stated that, as regarded James M'Intyre, he

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was ignorant of the mode in which the books were kept by his partners. But it was not necessary to go into that part of the case. But there was this fact to be considered now, that for the last five years the insolvent, James M'Intyre, had suffered punishment for this offence, assuming that the offence had been established. His certificate had been suspended for the last five years, and that constituted a grave and severe punishment to a man starting in life. Those circumstances would justify a lenient view being now taken of the insolvent's conduct. He appeared to have been a junior member of the partnership, and his duties to have been distinct from those in connection with the keeping of the accounts of the firm. He had to do with the care and management of the cattle and sheep at a farm in a distant part of the country. The insolvent had also stated that the debts of the firm were principally caused by the loss of stock during bad seasons, and that was not contradicted. Assuming, therefore, that James M'Intyre was liable for the acts of his partners in not keeping books, they thought that he had suffered sufficient punishment for that offence by being deprived of his certificate for five years, and that further punishment was not necessary. The learned judge of the Court of Insolvency had also decided that he would not dispense with the condition imposed by section 136 of the Insolvency Statute that a certificate should not be granted in certain cases unless the insolvent paid a dividend of 7s. in the £1. The decision of the judge on that point was not exempted from appeal where he had dispensed with the condition, and it would, therefore, seem that there could be also an appeal where he had refused to dispense with the payment of the dividend as a condition of obtaining the certificate. For the same reason that the Court thought that the punishment the insolvent had undergone was sufficient. They also thought the condition as to his paying a dividend of 7s. in the £1 should also be dispensed with, viz., that the losses of the firm had been caused by bad seasons. There was no contradiction of the insolvent's statement, and if so, the failure to pay the dividend arose from circumstances for which it would be unjust to hold the insolvent answerable. The appeal would, therefore, be allowed, the decision of the Court of Insolvency overruled, and the certificate be granted, and the condition of paying a dividend of 7s. in the £1 dispensed with. No costs of the appeal would be given.

Appeal allowed without costs. Certificate granted.

May 12.

THE QUEEN v. COPE, *Ex parte* CEREZO.

Justices of the Peace Statute 1865 *(No.* 267*), sec.* 107*—Dismissal of complaint—Certificate of dismissal—Estoppel—A dismissal of a complaint or information by Justices of the Peace followed by a certificate of such dismissal is, under sec.* 107 *of Act No.* 267 *no bar to another action for the same matter between the same parties in any other Court but a Court of Petty Sessions.*

Rule *nisi* for a *mandamus* to compel the judge of the County Court at Melbourne to hear and determine an action of *Cerezo v. Jackson.*

MR. FULLERTON moved the rule absolute; no cause was shown.

Cerezo had sued Jackson in the County Court to recover a sum of £5 19s., balance due for work and labour done in painting some houses in Collingwood. The defendant gave evidence to the effect that the same case had been previously heard in the Police Court at Collingwood, when the plaintiff's claim was dismissed, and a certificate of the dismissal, signed by the clerk of petty sessions, was produced. It was contended for the defendant that this certificate was a bar to the action in the County Court being proceeded with. Judge Cope agreed with this view, and gave judgment for the defendant, with costs. It was sought to compel him to hear and decide the case, irrespective of the decision of the justices at Collingwood.

MR. FULLERTON said that the question had already been determined in the case of *Reg. v. Trench, ex parte Chalmers*, 9 V. L. R. 55, where it was held that a dismissal of a complaint or information by justices, followed by a certificate of such dismissal, is, under section 107 of the Justices of the Peace Statute 1865, no bar to another action for the same matter between the same parties in any other Court but a Court of Petty Sessions.

THE COURT made absolute the rule to compel the judge to hear the case.

Ex parte MOSS. May 12.

Master and servant—Misconduct of servant engaged by the month during the currency of a month—Dismissal—Wages—A servant engaged by the month who is guilty of misconduct during the currency of a month which warrants his dismissal is not entitled to wages for the expired portion of the month.

Rule *nisi* to prohibit the Justices at Port Melbourne from enforcing an order made in a complaint of *Stutz v. Moss.* The complainant sued for £4 4s., for money due to him for work and labor from the 1st to the 19th February last. The evidence at the trial was that Stutz was employed as watchman on board a lighter owned by Mr. Moss. He was engaged and was paid by the month. On the 19th February he was dismissed by the manager of Moss for misconduct. The manager at the same time gave him an order on Moss for payment of 19 days' wages. His month's engagement did not terminate till the 28th February. Moss refused to pay him anything for that month on account of his misconduct, and he then sued for the work he had done till the time of his dismissal. The defence was, that as he was engaged by the month and had been guilty of misconduct during the currency of the month, he was not entitled to

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be paid anything. The justices, however, considered that Moss was bound by the order given by his manager, and made an order against him for payment of the amount claimed, £4 4s., with £1 6s. costs.

MR. HODGES moved absolute the rule prohibiting the justices from enforcing the order. It was clearly established that a servant engaged by the month could not recover any wages if he was guilty of any misconduct. No cause was shown.

THE COURT made the rule absolute.

May 12.

BOYLE V. REYNOLDS AND ANOTHER.

Justices of the Peace Statute 1865, *No.* 267, *sec.* 150 *—Appeal case—Notice of appeal—The appellant did not give notice in writing to the respondent of the appeal till after the transmission of the case of the Full Court*—Held, *that the case must be struck out.*

This was a special case stated by the justices at Warragul. The Hotham justices had made an order against a man named Collins, on the complaint of Mr. Reynolds, and a distress warrant was issued to enforce it. Under this, some goods belonging to Collins were seized by Sergeant Boyle, when Mr. R. Guthridge claimed them. Boyle then took out a summons in the Police Court at Warragul, requiring Reynolds and Guthridge to appear and have it decided who was entitled to the property. The justices decided against Guthridge, who appealed.

MR. DUFFY appeared for the respondent, and proved a notice given to the other parties that the case should be struck out, as the provisions of section 150 of the Justices of the Peace Act, in reference to the transmitting of the special case, had not been complied with. The section provided that the appellant should, within 14 days after receiving the special case from the justices, transmit the same to the Court, first giving notice in writing of such appeal, with a copy of the case, to the respondent. In this instance the case was transmitted to the Court on the 10th March, and the appellant did not give notice of it to the respondent till the following day.

There was no appearance for the appellant.

THE COURT held that as the requirements of the Justices Act in reference to the giving notice of appeal, &c., had not been complied with the case must be struck out.

MR. DUFFY asked for costs.

MR. JUSTICE HIGINBOTHAM said that it appeared that the respondent had omitted to supply copies of the special case to the judges of the Court as should have been done, and therefore no costs would be allowed. It was important that the rule should be observed which required copies of special cases to be delivered in time, and for the future where that rule was not observed no costs would be given.

MR. HODGES appeared for the sergeant of police, and asked for his costs. He was obliged to attend, as he had been served with notice of the proceedings.

MR. JUSTICE HIGINBOTHAM said that the sergeant need not have attended. He had nothing more to do with the case after he had brought the different claimants to the goods before the justices. He was in an analogous position to that of the sheriff, and though nominally he was complainant in the case, yet practically he was under the protection of the justices, who would see that he did not suffer any wrong, and he should allow the different parties claiming the goods to have the matter decided between themselves.

Appeal struck out without costs.

M'KINNON V. MORRIS. May 13.

Negligence—Burden of proof—Contributory negligence—Withdrawal of case from jury—In actions for negligence the burden rests upon the plaintiff of proving affirmatively that the negligent act or omission for which the defendant is sought to be made liable has been the causa causans *or efficient cause of the plaintiff's injury—The question of contributory negligence is a question of fact for the jury, and a judge is not justified in withdrawing the plaintiff's case from the jury upon this ground unless where there has been no evidence at all given, except what necessarily goes to show that the negligence of the plaintiff himself has been the efficient cause of his injury.*

Appeal from County Court, Warrnambool.

MR. HODGES and MR. JOHNSTON for the defendant (appellant); MR. BRYANT for the plaintiff (respondent.

The plaintiff, William John M'Kinnon, a child about 12 years of age, sued the defendants, Messrs. Morris and Begg, for damages for injuries he had sustained by their negligence. The defendants, who are contractors, were constructing some buildings for the Savings Bank at Warrnambool. They left some large stones in one of the streets off the footpath. The plaintiff and two other boys were playing in the street, and the plaintiff leant against one of the stones. The stone fell upon his right foot and crushed it. At the trial a verdict was given for the plaintiff for £50, and the defendants appealed on the ground that there was no evidence that they had been guilty of any negligence, and also that the evidence showed that the plaintiff had been guilty of contributory negligence.

MR. JUSTICE HIGINBOTHAM, in giving the judgment of the Court, said: This is an appeal from a decision of the judge of the County Court at Warrnambool dismissing an application made on leave reserved at the trial to set aside a verdict entered for the plaintiff for £50, and to enter a nonsuit. The defendants claimed that the case should not have been sent to the jury, on the grounds —first, that there was no evidence to show that the injury which the plaintiff had sustained arose from

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the negligence of the defendants or their servants; and secondly that as the evidence for the plaintiff disclosed that the injury complained of was caused by the act of the plaintiff, he was the author of his own wrong. In the argument addressed to us, reliance has been almost entirely placed on this latter ground. The plaintiff was a boy 12 years of age. He was playing on the day in question with two other boys in the street, either around or among a number of large stones deposited in the roadway by the defendants for building purposes. One of these stones, weighing about 15 cwt. was placed standing on its edge, and, according to one witness, in a slanting and unsafe position. The evidence went to show that the plaintiff, while engaged in play, and standing in front of this stone, put his hand and leaned lightly upon it; that it fell down on its bed, and that in falling it caught the plaintiff's right foot and injured it. It was not proved that the defendants were authorised to place these stones in the street. The part of the roadway occupied by the stones was planked and trestled on the outside and a part of the ends. The inside part next the footway was not guarded in any way. Upon these facts it has been contended that the judge was bound to hold, as a matter of law, that the plaintiff was the author of his own wrong, and that there was no evidence which could properly be submitted to the jury. Every judicial inquiry in cases of this kind, has for its object the discovery of the *causa causans*, the primary and efficient cause of the injury sustained by the plaintiff. This primary and efficient cause *incuria dans locum injuriæ*, may be different from the proximate and apparent cause. The burden rests upon the plaintiff of proving affirmatively that the negligent act or omission for which the defendant is sought to be made liable, has been the efficient cause of the plaintiff's injury. And if at the close of the case the judge should be of opinion that, as a matter of law, there is no evidence reasonably fit to be considered by the jury—that is to say as it has been well put by Brett, J., in his opinion given to the House of Lords, in *Bridges v. North London Railway Co.*, L. R. 7 E. & I. App., at p. 233: "If there are no facts in evidence which if unanswered, would justify men of ordinary reason and fairness in affirming the proposition, which the plaintiff is bound to maintain," it is the judge's duty to direct the jury as matter of law that there is no case in favour of the plaintiff, or he must nonsuit the plaintiff (*Ryder v. Wombwell*, L. R. 4 (E.), p. 32; *Giblin v. M'Mullen*, L. R. 2 P. C. 317). It not unfrequently happens in these cases that the evidence tends to show that the plaintiff himself has been, in fact, the proximate and apparent cause of his injury. But such evidence will not justify the withdrawal of the case from the jury. The plaintiff will be entitled to recover unless he is chargeable with contributory negligence, that is to say, unless he has himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened (*Davis v. Mann*, 10 M. & W., p. 546; *Tuff v. Warman*, 5 C. B. N. S., p. 573; and 27 L. J. C. P., p. 322; *Radley v. London and North-Western Railway Company*, 1 A. C., p. 754). The ordinary care and caution, or, as it has been sometimes expressed, the reasonable care and skill, which a person is bound to exercise in the endeavour to avert the consequences of another's negligence, and the proved want of which will defeat a recovery by him, presents a question of fact, not of law, and is to be determined by the jury and not by the judge. The determination of this question necessarily involves, in many cases, the consideration of the state of health or of strength, physical or mental, of the person who is alleged to be wanting in such ordinary care and caution. The same amount of care and skill in avoiding dangers of the streets caused by the negligence of others cannot be demanded from a blind man and from a man who has good sight; from a deaf man and from a man who has good hearing; from an infant and from an adult (*Lynch v. Nurdin*, 1 Q. B., p. 36); from a man who is acquainted with and remembers an existing cause of danger and from a man who, though acquainted with it, has temporarily and *bona-fide* forgotten it (*Leahy v. Stuart*, 3 V. L. R. (L.), p. 310). On the other hand, similar considerations founded on the varying circumstances of individual cases may have to be regarded also, as they affect the liability of a defendant, and limit that liability by confining it to those consequences only which, in the ordinary course of things, are likely to arise, and which may, therefore, be reasonably expected to arise. In either aspect, whether as limiting the liability of a defendant, or as elements in the question of contributory negligence of a plaintiff, all such special circumstances can only be dealt with as matters of fact by the jury; and we think that it may be safely affirmed that a judge is not justified in withdrawing the plaintiff's case from the jury upon this ground of contributory negligence, unless where there has been no evidence at all given, except what necessarily goes to show that the negligence of the plaintiff himself has been the efficient cause of his injury (see per Lord Selborne in *The Dublin, Wicklow, and Wexford Railway Company v. Slattery*, 3 A. C., at p. 1189. *Hughes v. M'Fie and Others*, 2 H. & C., p. 744; 33 L. J. (E.), p. 177; and *Mangan v. Atterton*, L. R. 1 (E.), p. 239, were cited in opposition to the view that the infancy of a plaintiff charged with contributory negligence is a circumstance which requires that the plaintiff's case should be submitted to the jury. The latter of these cases contains no reference to *Lynch v. Nurdin*, 1 Q. B., p. 96, and the decision may be supported on one of the grounds stated by

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the Court, namely, the absence of evidence of negligence of the defendant. In *Hughes v. M'Fie and Others*, 2 H. & C., p. 744; 33 L. J. (E.), p. 177, it was observed by the Court that had the plaintiff been an adult, it was clear that he could maintain no action, and that the fact of the plaintiff being of tender years made no difference. This observation is opposed to the doctrine of *Lynch v. Nurdin*, and we venture to think that it is equally inconsistent with reason as with earlier authority. It is impossible to reconcile this decision with the numerous later authorities, which tend to show that the question of ordinary care and caution, or reasonable care and skill of a plaintiff charged with contributory negligence, is a question which, except where the evidence is altogether one way, and necessarily goes to show that the negligence of the plaintiff himself has been the efficient cause of his injury, must be left to the jury as a question of fact, with all the attendant circumstances of the case, and cannot be determined as a question of law by the Court. In the present case we are of opinion that the judge of the County Court would not have been justified in withdrawing the case from the jury. The evidence of negligence on the part of the defendants was distinct and strong. They deposited a number of weighty stones in a public street without authority, and they placed this stone with others in a dangerous position, without enclosing them and preventing access to them by the public. The plaintiff had a right, as against the defendants, to use every part of the street, including the places where these stones were, for the purpose of transit, either in sport or otherwise. It does not necessarily follow from the evidence—although it is far from improbable—that the plaintiff, while playing with the other boys in the immediate neighbourhood of this danger, was wanting in the care and caution which would be demanded from an adult; but a lesser degree of care and caution might reasonably be expected from a boy in the same circumstances. It was not for the judge—it is not for us—to determine whether the plaintiff was or was not deficient in the care and caution reasonably to be expected from him. The jury have found in his favour, and we think that their finding cannot be disturbed. The appeal will be dismissed with costs.

GRIFFIN v. ROSS. May 13.

Judicature Act 1883, *No.* 761, *secs.* 56, 71—*County Court Practice — Counter-claim—Admission of evidence — Illegal impounding — A document signed by the person impounding and given to the poundkeeper, and which stated that certain horses had been impounded and that certain damage for the trespass was demanded is receivable in evidence, it having been proved that such person impounding has instructions from the defendant to impound, and that he did impound —A judge of the County Court has power under sec.* 56 *of Act No.* 761 *to entertain a counter-claim.*

Appeal from County Court, Melbourne.

MR. FINK for the plaintiff (appellant); MR. DUFFY for the defendant (respondent).

The plaintiff, Mr. James Griffin, sued the defendant, Mr. Murray Ross, in the County Court for £150 damages for illegally impounding. The defendant desired to put in a counter-claim for £200 for damage he sustained through the plaintiff's horses trespassing on his land, but Judge Cope decided that section 71 of the Judicature Act prevented him receiving a counter-claim. The evidence for the plaintiff was then taken, and was in effect that the horses had been impounded at Caulfield by a man named Maple, and that the defendant had admitted that he had given to Maple general instructions to impound any horses or cattle trespassing on the property. The plaintiff tendered in evidence a document purporting to be signed by Maple, and given to the poundkeeper, to the effect that he had impounded 10 horses, which were trespassing on the land of Mr. Murray Ross at Caulfield, and claiming damage for the trespass at the rate of £2 10s. per head. Judge Cope refused to receive the document in evidence, and the plaintiff's counsel then said that he could not further proceed with the case, in the absence of that document, and the plaintiff was nonsuited. Against the decision the plaintiff appealed, contending that the evidence was admissible. The question was also submitted to the Court whether a judge of a County Court had power under the Judicature Act to admit a counter-claim by a defendant to a plaintiff's claim. Section 71 of the Judicature Act provided that nothing in this Act shall be deemed to affect or alter the practice, procedure, or fees of any County Court, or to take away any right to have any class of cases heard and determined in a County Court. Judge Cope held on this section that he could not receive a counter-claim. The defendant, however, contended that section 56 of the Judicature Act gave him authority to receive a counter-claim. This section provided that "every inferior Court, which now has, or which may after the passing of this Act have jurisdiction in equity or at law and in equity, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceedings before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal, in as full and ample a manner as might and ought to be done in like case by the Court."

MR. JUSTICE HIGINBOTHAM said that the document signed by Maple, and which had been rejected, was admissible in evidence, and the appeal would therefore be allowed, but as it was not clear whether the document had been rejected because

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the signature was not proved, no costs of the appeal would be given. The case would be reheard before a judge of the Supreme Court. There was a further question which it was not necessary to decide on this appeal, but as the opinion of the Court was desired upon it, he would give it. It was on the question whether a judge of the County Court had power, under the Judicature Act, to receive a counter-claim by the defendants. The learned judge had in this case rejected a counter-claim by the defendant on the ground that section 71 of the Judicature Act prevented him from entertaining it. The language of section 56 of the Act, however, gave him power to entertain it, subject to the rules and practice of the County Court.

Ex parte M'LELLAN. May 14.

Married woman—Inability to satisfy distress—Fine or imprisonment—Application to quash warrant of justices—Issue of warrant—Criminal proceeding—The issue of a warrant by justices to enforce payment of fine for "sly-grog" selling or in default imprisonment is not a civil but a criminal proceeding—If a woman has no goods whereby a distress for levy of amount of fine could be satisfied the alternative of imprisonment under the warrant may be enforced.

Rule *nisi* to quash a warrant by the justices at Branxholme, by which Isabella M'Lellan, a married woman, was sent to gaol for one month, in default of paying a fine of £25. Mrs. M'Lellan was fined for sly-grog selling, the amount of the fine to be recovered by distress. There were no goods of hers which could be found to be distrained upon, and she was then by a further order of the justices sentenced to a month's imprisonment. It was contended on her behalf that as she was a married woman she could not be sent to gaol for not having goods to satisfy the distress.

MR. HOOD moved absolute the rule to quash the warrant; MR. CHOMLEY showed cause.

MR. CHOMLEY said that the applicant apparently relied upon decisions of the Courts in England, that a married woman ought not to be imprisoned for not satisfying a judgment. But that was only a practice in some of the Courts, and did not extend to criminal offences. Mrs. M'Lellan was in this instance fined for an offence against the law, and the alternative punishment of imprisonment was imposed upon her for not paying the fine. There was no more reason why a married woman should escape punishment because she said she had no property than that a man or an unmarried woman should escape. Besides, the law now allowed a married woman to own property, and the Court would not assume that she had no property.

MR. HOOD admitted that if this was to be regarded as a punishment the applicant had no case. But he submitted that it was not a punishment, but a means provided for enforcing the distress, and that was a civil and not a criminal proceeding. In a late Customs Act in England there was a special provision to the effect that a married woman could be imprisoned for an offence against that Act.

MR. JUSTICE HIGINBOTHAM said that the authorities relied upon by the applicant were civil cases. But in this case the proceeding was criminal. The justices had a discretion in the first instance to impose a fine or imprisonment. The fine was imposed, and if she obtained the money from her husband or her friends she was not further punished. But if she did not, then the law provided that a distress be levied on her goods, if she had any. If she had none, the law allowed the justices to impose a sentence of three months' imprisonment. In this case, therefore, the order of justices sentencing her to a month's imprisonment was good, and the order to quash the warrant based on it would be discharged with costs.

SUPREME COURT SITTINGS.

(Before His Honor Mr. Justice Molesworth.)

MITCHELL v. M'DOUGALL. May 7.

Forfeitures for Treason and Felony Abolition Act 1878, No. 627—Assignment by curator of mining lease contrary to duty as curator—When a defendant who procured for himself the appointment of curator under Act No. 627, sec. 8, wrongfully transferred certain property belonging to the estate the Court ordered a reconveyance and an indemnification for all loss resulting from such wrongful act to the owner on his release from custody.

The plaintiff, Wm. Mitchell, sued the defendant, F. J. M'Dougall, seeking that the defendant should be compelled to retransfer to him a lease of some mining land. The plaintiff had been manager of the Old Welshman's Reef Company, and the lease was held in his name. He was convicted on a charge of forgery, and was sentenced to six months' imprisonment. Whilst he was in prison M'Dougall was appointed by the Governor-in-council to be curator of his estate, under the Act No. 627. Under this the defendant purported to transfer the lease that was in Mitchell's name to other persons, alleging that he was only a trustee for the shareholders in the company. It was submitted for the plaintiff that the defendant had no power to transfer the lease.

MR. WALSH and MR FULLERTON for plaintiff; MR M'DERMOTT and MR. WORTHINGTON for defendant.

HIS HONOR, in giving judgment, said: Mr. Mitchell, the plaintiff, in this suit got a lease in July 10, 1879, from the Crown, for 15 years, for mining purposes. A company, the Old Welshmen's Reef Gold-mining Company, No Liability, registered November 2, 1879, had Mitchell for its manager, and actually took possession of and worked the land, the legal estate being in Mitchell—I should say, as far as appears—as a trustee for the company. I have uncontradicted evidence that he was entitled to £1000 as due to him from the

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company, and was entitled to his legal estate to secure him that sum paramount to any proved rights of the company. The plaintiff was charged with having forged the names of certain persons as shareholders in the company, as legal manager, in order to procure its registration. (As I take it, these were the names of fictitious persons.) He was convicted on March 16, 1882, and sentenced to six months' imprisonment. He served his sentence so far as such sentences are usually enforced and was discharged on August 24, 1882. The defendant, Mr. M'Dougall, had been his clerk as to the affairs of the Old Welshman's Reef Gold-mining Company, and applied himself to the formation of a new company named ultimately the Old Welshman's United Gold-mining Company, No Liability, and to assist this object wanted to procure from the plaintiff an assignment of the legal estate in the lease to trustees for a new company. The defendant went several times to the prisoner to extort this assignment from the plaintiff, and threatened him with the consequences of refusal. The plaintiff refused on the ground of his claim against the old company. On August 7, 1882, the defendant procured an appointment of himself as curator of the plaintiff's estate under the Act 627. On August 30 the plaintiff lodged a caveat in the registry office against acts affecting the lease, which he allowed to lapse. The defendant procured himself as appointed curator to be registered as owner of the lease on 31st August, and on the same day executed a transfer to the intended trustees of the new company. The bill assailing this assignment by the defendant as curator, and seeking a conveyance of the lease to the plaintiff, was sealed on September 25, 1882. During the pendency of the suit the lease was assigned by the trustees to the new company, which has obtained registration as owner of it. On the argument of a demurrer, reported 9 V. L. R. (E.), 13, I held that the plaintiff in his bill need not negative the several cases mentioned in the Act 627, which would warrant a curator to assign the lease, and therefore overruled the demurrer. The defendant answered, and evidence was taken before me. The defendant did not attempt to prove that his assignment as curator was warranted by any of the provisions of the Act 627, or had anything of honesty or good faith in it. The plaintiff owed some debts, for which, as far as I see, the old company was primarily liable, and I had no evidence that the assignment was made with the intent of paying them. So I am prepared to hold that as between the plaintiff and defendant the assignment was contrary to the duty of defendant as curator. The answer insisted that the new company should be made a party defendant. I think the plaintiff might seek his redress against the defendant personally, without doing so, but his immediate redress in the suit may be found very narrow. Another objection for want of parties has been made late in the argument—the absence of the old company. If it had been raised by answer it might have met various replies or excuses. The old company may enforce its right against the plaintiff. I shall declare that the assignment of the lease of July 10, 1879, in the bill mentioned by the defendant, Finlay J. M'Dougall, was not warranted by his office as curator of the estate of the plaintiff, Wm. Mitchell, and order him forthwith to convey the said leasehold estate to the plaintiff, as far as he can, by a conveyance to be settled by the chief clerk in case the parties differ, and declare that the defendant is responsible to the plaintiff for any loss resulting from acts of the defendant encumbering or affecting the said leasehold estate. Order the said defendant to pay the costs of this suit not otherwise ordered, up to and including this decree to the plaintiff when taxed and ascertained. Refer to tax; liberty to apply.

HUNT v. SNOWBALL. May 7.

Sale of land—Excess of supposed frontage over real measurement—Reconveyance of such excess—Costs.

The plaintiff, Mr. Wm. Hunt, a chemist carrying on business at Coburg, sued the defendant to prevent him obtaining registration of some land at Coburg. In September, 1883, the plaintiff owned some land at Coburg, on portion of which he had erected a house, and which had been mortgaged to the Federal Building Society. The land was supposed to have a frontage of 137ft. to the Sydney-road. The plaintiff said that he sold 100ft. of the frontage to the defendant, Mr. Snowball, a solicitor, at the rate of £2 10s. per foot. The part reserved included that on which his house was built. The defendant paid off the Federal Building Society, and obtained the title deeds. It was afterwards discovered that the land, instead of having a frontage of 137ft. had a frontage of 165ft. The defendant some months ago applied to be registered as owner of a greater portion of the land than the 100ft. and the plaintiff, receiving notice of this, disputed his right to have more than the 100ft., and brought the action, claiming a sum of £32 10s. as balance due to him by the defendant, after having paid off the building society, and also claiming to have the 28ft.—the difference between 137ft. and 165ft.—restored to him. The defendant had sold 117ft. frontage to Mr. G. Patterson, and the plaintiff said he was willing to allow that sale to stand good, provided he was paid for the extra 17ft. at the rate of £2 10s. per foot. The defence was that the agreement was not that the defendant should buy the 100ft., but that he should pay off the mortgage to the building society, and receive all the land, except that on which the plaintiff's house was erected.

MR. TOPP for the plaintiff. MR. A'BECKETT and MR. MOULE for the defendant.

HIS HONOR, in giving judgment, said: Mr. Hunt, the plaintiff, a chemist, owned a piece of

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land fronting the Sydney-road, Coburg, 165ft. frontage by a depth of 217ft. Its southern boundary was Baxter's lane; about 100ft. northward was a post; then came an interval of about 17ft. with no building fronting the road, but a good way back some stables owned by the plaintiff, and then the plaintiff's house and shop along the road, about 48ft. to the northern boundary. The plaintiff was embarrassed, having his land mortgaged to the Federal Building Society, to which about £218 was due, which was pressing for payment, and threatening to sell. During 1883 there were communications between him and the defendant, Mr. Snowball, then an articled clerk of a solicitor, and now admitted to that profession. There was talk about the defendant keeping the plaintiff to get information as to the account with the society, borrowing money to pay it, and selling the land for the purpose. This ended in something of the defendant becoming in some shape the purchaser. The plaintiff seems to have been under a misapprehension as to the length of his land, which he supposed to be 137ft. instead of 165ft, and the frontage of his house, which he supposed to be 37ft. instead of 48ft. The first document produced is an agreement dated 11th September, 1883, signed by the plaintiff, written by the defendant, stating that the plaintiff had that day sold to the defendant his land and shop at Coburg, having a frontage of 137ft or thereabouts for £2 10s. per foot, defendant to pay out of the purchase money what was due to the Federal Building Society for money advanced and costs, and the balance to the plaintiff within a month from date, the plaintiff undertaking to execute the necessary transfers as soon as requested. The plaintiff had forgotten the existence of this document produced by the defendant. There appears to have been an understanding that the plaintiff's house should not be included in the sale, and, therefore, the defendant signed a document, dated September 12, 1883, "I hereby undertake to allow you to retain the ownership and the possession of the shop and 37ft. of land at Coburg, with the full depth, and, when the title permits, to transfer to you," with a memorandum, "The 37ft. referred to is the portion of the north side of land lately sold by you to me, and on part of which your shop, &c., now stands." The shop being on 48ft., I think that word would overrule the measurement 37ft., so that I rather think that the combined effect of the two writings, if signed by both parties, would be to entitle the defendant to 117ft. at £2 10s. per foot. But the defendant says that at that time there was no bargain at all, that the document of the 11th September was signed only for the purpose of showing to the building society to obtain information from it and induce it to stay proceedings. The defendant went to the plaintiff's house on the 12th, and there signed some document, I think that above set out, or that of which it is a copy. But the plaintiff says that about the same time the defendant came in, saying he had come to settle the agreement for 100ft. of plaintiff's land at £2 10s. a foot; as soon as he sold he would settle with him; that he then went out with the defendant to the above post, and put his hand upon it, and said it was 100ft. more or less. The plaintiff rests his case on this as a verbal contract. As to the fact, he is corroborated by his two daughters, and I believe them. On September 14, 1883, the defendant induced the plaintiff to sign a letter to the Federal Building Society, authorising it to transfer to the defendant direct his land at Coburg, being about 137ft., he having sold the same to him for £2 10s. a foot, he paying off its claim thereon. The defendant says still there was no bargain between him and the plaintiff; but he says that he had the land valued by Mr. Taylor, who valued it at £2 a foot, and so informed the plaintiff on September 19. The plaintiff then informed him that the land measured 165ft., and that altogether they agreed that the defendant should have the land on the terms first proposed for the price of the debt due to the society, reserving 37ft. and the shop. He told the plaintiff that the whole of the land must be given as security to a building society, from which the money to pay off the Federal Society was to be procured, and he seems to say he was to pay after he could sell. The plaintiff, I think truly, denies any such agreement. The defendant caused the preparation of a document, afterwards executed September 21, 1883, stating that the Federal Building Society, registered as the proprietor of the land, in consideration of £218 6s. 5d., paid to it by Hunt, and in consideration of £342 10s. paid to Hunt by Snowball, and in consideration of £240 paid to Snowball by the County of Bourke Building Society by the direction of Hunt and Snowball, testified by the signing, transferred the land to the County of Bourke Permanent Building Society. There is some conflict of evidence about the execution of this document on various points. The plaintiff says he never read it, and signed it so folded that he could not see its contents. The defendant says that he explained to him that £218 6s. 8d. was the amount he had to pay the Federal Building Society, that £242 was the amount he was borrowing from the County of Bourke Society, and that £342 was a nominal consideration; £342 was exactly the amount of 137ft. at £2 10s. a foot, so that plaintiff, if he read the document, might imagine in it a sale at that price per foot. From the same document he might suppose that his debt to the Federal Building Society was fully paid, and that he was to get £342. But the document had the effect which the defendant wanted, to make him, settling with the County of Bourke Building Society, able to get a conveyance to himself, and make him master of the position without having written anything showing any obligation by him to the plaintiff. It appears that the defendant about December 30, 1884, made a contract of sale to Mr. Patterson of 128ft. of the

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land, which would include 10ft. of the plaintiff's shop, of which the plaintiff was informed by Patterson posting a notice of intended sale on plaintiff's shop. On remonstrance defendant made a new arrangement with Patterson to convey only up to the plaintiff's shop. On January 13, 1885, he lodged a caveat in the office of titles against dealing with the land except the 100ft., and he got notice of some attempt to procure a registration notwithstanding it. On January 19, 1885, the plaintiff's solicitor wrote a letter to the defendant, stating that on September 12, 1883, plaintiff sold him part of his land, 100ft. from Baxter's-lane, at the price of £2 10s. per foot, and allowed him to get possession of his title, he undertaking to re-transfer to him the balance of his land; but, in the face of that, he had sold more than the 100ft. at an increased price per foot, and that land had been advertised for sale, and that to an extent running into the plaintiff's house, and calling upon the defendant to transfer the balance of the land and pay the balance of the purchase money. The defendant answered the plaintiff himself, avoiding, as he had done throughout, to sign any statement of his contract with the plaintiff. He referred to the sale in September, 1883, about which they had various conversations without coming to anything satisfactory, then saying that by a survey of the ground recently made he found that the plaintiff's house stood 11ft. on his land, and not wishing to insist on his rights to the full extent of compelling him to shift, he would without prejudice, &c., abandon his right to the 11 additional feet. As to transferring to him his portion of the land at once he could not do so, and plaintiff was not entitled to ask him; that his portion of the land had been sold, and he would take the necessary proceedings to recover from the plaintiff any loss that might be occasioned by his interference with the sale, and asking to be referred to a solicitor, and threatening the plaintiff with all consequences of litigation. I see no reason to delay the plaintiff's redress for anything to be done. On June 28 the defendant procured a transfer from the County of Bourke Building Society to him. I have some doubt, although believing the plaintiff's account of the conversations and acts, September 3 and 12, whether that should be taken as the contract or the combined effect of the writings of September 11 and 12. Neither party has urged this It would increase the money to be paid, diminish the quantity of land to be conveyed to the plaintiff. I shall order that the defendant pay to the plaintiff within one month the sum of £31 13s. 7d., and also that the defendant forthwith execute a conveyance of the land in the statement mentioned of 65ft., being more than 100ft. north of Baxter's-lane, and procure the necessary conveyances from all parties deriving title under him, as the chief clerk may direct, so as to enable the plaintiff to make himself the registered owner of the said land, the said plaintiff paying the expenses of actual conveyance to him. Order the defendant to pay to the plaintiff the costs of this suit when taxed and ascertained; refer to tax order that defendant be restrained from doing any act or executing any document affecting the title to the said land so to be conveyed to the plaintiff by this order; and restrain the registrar of titles from allowing the registration of any conveyance inconsistent herewith; liberty to apply.

DAVEY v. PEIN. May 14.

Insolvency Statute 1871 (*No.* 379), *sec.* 70—13 *Eliz., c.* 5—*Life Assurance Companies' Act* 1873 (*No.* 474), *sec.* 37—*Life Policy—Assignment in trust for benefit of children of assignor—Registration of assignment—Insolvency of assignor within five years—Bill by trustee of his estate to set aside assignment of life policy—Construction of sec.* 37 *of Life Assurance Companies' Act* 1873—*Overplus.*

This was a suit by Thomas James Davey, as trustee of the estate of Henry Luth, late of Echuca, claiming to be entitled to a policy of £1000 effected on Luth's life in the National Mutual Life Association. On the 28th March, 1877, Luth effected the insurance for £1000 with the company. On the 21st November, 1879, Luth assigned the policy to Wm. Pein, and the assignment was duly registered. The assignment, though absolute in form, was actually on trust for the benefit of Luth's children. At the time the assignment was made Luth was unable to pay his debts. Within five years from the date of the assignment, namely, on the 20th March, 1883, Luth voluntarily sequestrated his estate in the Insolvent Court, and the plaintiff was appointed trustee of his estate. Luth died in July, 1883. The plaintiff submitted that the assignment by Luth for the benefit of his children was void under section 70 of the Insolvency Statute, whilst it was contended for the children that the policy was, by the Life Assurance Companies Act, protected to the extent of £1000 from his creditors. But the plaintiff submitted that, apart from that question, he was entitled to have the assignment of the policy set aside, and that this was not the only policy that had been effected on Luth's life.

MR. HIGGINS appeared for the plaintiff; MR. A'BECKETT and MR. GREGORY for the defendants, Wm. Pein, H. Luth, H. B. Luth, and F. Luth; MR. COLE for the defendant, H. O'Hara Luth; MR. WEIGALL for the Insurance Company.

HIS HONOR said: On March 28, 1877, Mr. Henry Luth effected a policy of insurance on his own life with the defendant, the National Mutual Life Association of Australasia, for £1000, payable to his executors, administrators, and assigns, and such other sums as might be payable under its provisions of association. On November 21, 1879, he assigned this policy to the defendant, Mr. Pein, as a trustee for his three children, the defendants Henry,

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Nicholas Bernard, and Florest Luth, and Pein executed a declaration of trust. Henry Luth petitioned for liquidation, and proceedings were had by which Mr. Danby was appointed liquidator. That liquidation was discharged in April, 1880. On March 20, 1883, Henry Luth voluntarily sequestrated his estate for the benefit of his creditors, who on April 5, 1883, appointed the plaintiff, Mr. Davey, as trustee of the insolvent estate. In July, 1883, Henry Luth died. On November 1, 1883, Danby assigned to the plaintiff for £50 the outstanding assets of Henry Luth under the first insolvency, which might comprise a policy of insurance for £1500 effected by Henry Luth on his own life with the Colonial Mutual Life Assurance Society. The bill in this suit was sealed on November 2, 1883. The case made by it was that the assignment to Pein was without valuable consideration and void, both under the Act 13 Elizabeth and the Insolvent Act, as against the plaintiff Davey, and that the amount of the policy should be paid to him to be distributed according to the rights of the parties. The defendant Pein scarcely resisted the right of the plaintiff to the overplus of the policy over £1000, but as to that sum insisted that under the Act 627 Vict., section 3, his right as legal assignee of the policy was protected as a trustee for the three children. The clause in question is not easily understood. It says as to the £1000 that it shall not pass to assignees in insolvency such as the plaintiff, nor on the distribution of the assets of the insured applied to the payment of his debts; but it does not say what is to be done with it, or how far the insured may direct its application. I think that Henry Luth, as to this £1000, made a distinct trust of it for his three children, and never did anything to defeat that trust, and that £1000 of it should be so applied. As to any overplus which there may be, I agree with the plaintiff that the assignment was ineffectual against him. As to the other policy, I have no reason to say that the £1000 protection should be applied to it. The plaintiff claiming it as assignee of Danby did not seek to raise any question on the subject. I felt that there might be a question as between the three children and the next-of-kin or personal representative of Henry Luth, and therefore directed an amendment making the next-of-kin parties, and the widow, Caroline Luth, and another child, Herbert O'Hara Luth, were made defendants. The latter answered, the former did not. She, on September 11, 1884, obtained administration *cum testamento annexo* to Henry Luth, and has intervened in an interpleader suit set on foot by the Colonial Mutual Society. I shall declare that the policy of insurance in the bill mentioned effected with the defendant company by Henry Luth, deceased, was, and is to the extent of £1000 secured thereby, effectually vested in the defendant, William Pein, as trustee for the defendants, Henry Luth, Nicholas Bernard Luth, and Florest Luth, but as to the rest of the sum secured thereby the said assignment was void as against the plaintiff as trustee of the estate of the said Henry Luth. Order the defendant company forthwith to pay to the said William Pein the said sum of £1000, and the rest to the said plaintiff; order the said plaintiff to pay the costs not otherwise provided of all the defendants who appeared at the hearing. Refer to the taxing officers to tax. Liberty to apply.

BERGIN V. BERGIN. May 15.

Administration suit by next-of-kin of intestate—Widow—Allegation of illegitimacy — Costs as between solicitor and client—Where a man and woman have lived together as husband and wife the evidence to support an allegation that the parties were unmarried must be direct—Where inquiries have been made concerning such allegation the persons making them should be produced —Costs as between solicitor and client will not be given out of the estate to the widow in such a case.

This was a suit by James Bergin, on behalf of himself and Ellen Condon and M. Sheehan, who claimed to be the next-of-kin of one John Bergin, late of Hamilton, hotelkeeper, deceased, asking that the estate should be administered by the Court. The defendant was the widow of the deceased, and as such entitled to half of his estate, as there were no children. The plaintiff claimed that the remainder of the estate was divisible between him and Mrs. Condon and Mrs. Sheehan as the paternal uncle and aunts of the deceased, John Bergin. They alleged that they were the brother and sisters of Patrick Bergin, the father of John Bergin. The defendant, in her statement of defence, denied that the claimants were the next-of-kin of the deceased, as John Bergin was illegitimate, and therefore could have no next-of-kin.

MR. DUFFY appeared for the plaintiff; and MR. WORTHINGTON for the defendant.

In 1842 Patrick Bergin, the father of John Bergin, arrived in Tasmania. In 1849 he went to Portland in this country, and was employed as caretaker of the Union Bank at that place. He was then living with a woman whem he represented to be his wife, and who was addressed as such. About three years afterwards he went with this woman to Hamilton, where he carried on business as an hotel-keeper, she living in the house with him. In 1857 she died, and in the information that he gave on registering her death, Patrick Bergin stated that the deceased was his wife, and that he was married to her at Hobart. In 1863 Patrick Bergin died. His son John carried on the business of hotelkeeper, married the defendant, and died in 1879. Mr. Fetherstonhaugh, who had been police magistrate in the Hamilton district for several years, and Mr. R. Garton, who had been clerk of petty sessions, stated that Patrick Bergin and the woman with whom he was living had

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always been considered as husband and wife, and they had addressed each other as such. For the defence some correspondence which had been passed between the solicitor for the plaintiffs and the solicitor for the defendant was put in evidence, which stated that inquiries had been made in Hobart, but the record of the marriage could not be found.

His Honor said that the whole of the evidence as to the relationship of the parties in this country was that they lived together as husband and wife without the slightest doubt. The only evidence to displace that was the indirect evidence that some inquiries had been made by some persons in Tasmania; but if any reliance was to be placed on those inquiries, the persons who made them should have been produced. He would declare that the three persons named in the pleadings, James Bergin, Ellen Condon, and M. Sheehan, were each entitled to one-sixth of the estate of the deceased John Bergin, and that the defendant, as administratrix of the estate, should be paid her costs out of the estate.

Mr. Worthington asked for the costs as between solicitor and client.

His Honor said he would not give her costs as between solicitor and client. She had put forward a case against the plaintiff, but had given no evidence to support it.

Ninnis v. Heales. May 15.

Assignment by cestui que trust *of interest in portion of trust estate as security for loan—Mortgage—Assignment of* cestui que trust—*Parties—Where an executor had given instructions to his solicitors to do the necessary acts to entitle him to act as executor, and had acted as such although he had not proved the will—In an action by creditor of one of the* cestuis que trustent. Held, *that such executor was a necessary party.*

Mr. Higgins for the plaintiff; Mr. Webb, Q.C., and Mr. Worthington for the defendants.

The plaintiff, James Ninnis, brought the action to establish his claim against a portion of the estate of the late Mr. Richard Heales, and against a portion of a grant voted by Parliament in the year 1865 for the widow and family of Mr. Heales. The amount voted by Parliament was £3000; and an Act was afterwards passed vesting this sum on the executors of Mr. Heales, and directing that one-third should be paid to the widow, and that the interest on the balance should be applied to the maintenance of the family till the youngest child came of age, when the corpus should be divided among the children. Mr. Heales, by his will, appointed his wife executrix, and three executors, namely, his father (Mr. R. Heales, sen.), Mr. E. Ashley, and Mr. R. Bignell. He also appointed these four to be trustees of his estate. He directed that the income from his estate should be paid to his wife during her life, and on her death the property should be divided among the children. Probate of the will was granted to Mrs. Heales and to Mr. R. Heales, senior, and Mr. Bignell. Mr. Ashley was then absent from the colony. Leave was reserved to him to come in and prove the will, but he had never proved it. In 1867, R. P. Heales, a son of the deceased, borrowed from Mr. Ninnis a sum of £137. As security for repayment he gave to him an assignment of his interest in the Parliamentary grant to an extent not exceeding £250. He also gave a mortgage over his interest in the real property for £250, with interest at 6 per cent. In the same year, R. P. Heales became insolvent. His brother, Mr. H. C. Heales, purchased from his assignee any interest he might have in the will and land. R. P. Heales died a few years ago. The youngest son of Richard Heales came of age in April, 1884, and Ninnis then claimed the share of R. P. Heales in the Parliamentary grant, but this was refused unless he would take it in satisfaction of his debt. This action was therefore brought. Mrs. Heales and Mr. H. C. Heales being made defendants. Mr. R. Heales, senior, and Mr. Bignell are dead.

An objection was taken that Mr. Ashley should be made a defendant, as he was an executor of the will and a trustee of the estate. It was submitted that Mr. Ashley had never proved the will and had never acted as trustee, and it was, therefore, not necessary to make him a defendant. Mr. Ashley, however, stated that when he returned from England he told the solicitors to the estate to do what was necessary to entitle him to take part in the management of it; that he always understood he was an executor; that he and the other executors had jointly received the Parliamentary grant from the Treasury, and he had managed the investment of it. He had also managed all the real estate, letting the houses, and receiving the rent. He had accounted regularly for all his receipts and expenditure.

His Honor said that it seemed to him that Mr. Ashley had been the only acting executor and trustee, and that he ought to be made a party to the action. He would therefore adjourn the case, and give the plaintiff liberty to amend within a month, plaintiff to pay the costs of the day.

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IN CHAMBERS.

(Before His Honor Mr. Justice Higinbotham.)

June 3, 10.

MARRETT AND ANOTHER v. OSMAND.

Review of taxation—Commission to examine de bene esse—*The allowance of the costs of the examination of a witness* de bene esse, *who was subsequently examined at the trial, is in the discretion of the taxing officer.*

Application by the defendant for a review of taxation of costs.

One of the plaintiffs, who was about to leave the colony to reside permanently abroad, was examined *de bene esse*. This witness left the colony, and the defendant's solicitor obtained a commission to examine the defendant, and his witness, who were out of the colony, thereby delaying the trial. Before the trial took place the plaintiff, who had been examined *de bene esse*, returned to the colony and gave evidence at the trial. On taxation the taxing officer allowed the costs of the examination *de bene esse*, as he thought the step, under the circumstances, was a prudent one. From this the defendant appealed on the ground that as the witness had given his evidence at the trial the costs of the examination *de bene esse* should not have been allowed.

HIS HONOR said: This is an appeal by the defendant from the allowance by the taxing officer of the items charged in the plaintiffs' bill of costs relating to the examination *de bene esse* of one of the plaintiffs' witnesses. The trial was delayed in consequence of the defendant's solicitor having obtained an order for the examination of the defendant and his witnesses, who were absent from Victoria. The plaintiffs' witness returned before the trial. The taxing officer thought that it was a proper precaution to have the witness examined before he left the colony with the intention of permanently residing abroad. I think that, under the circumstances, the taxing officer exercised rightly the discretion allowed to him. The summons will be dismissed with costs, which I fix at 30s.

Solicitors: For plaintiffs, *Best*; for defendant, *Malleson, England* and *Stewart*.

(Before His Honor Mr. Justice Williams.)

June 12, 13.

CRISPE AND ANOTHER v. APPLETON.

Rules of Supreme Court 1884, *Order XXX., r.* 1 —*Order XXXI., r.* 12—*Summons dismissed for vagueness—Practice in applications for discovery and interrogatories, where a general summons has not been taken out.*

Application on behalf of the plaintiffs for discovery.

The summons was as follows:—"Let all parties concerned attend a judge in Chambers on Friday, the 12th day of June, 1885, at 9.30 o'clock in the forenoon, on the hearing of an application on the part of the plaintiffs for directions for discovery."

MR HIGGINS in support.

No opposition was made to the application.

HIS HONOR said: This is the vaguest summons I ever had before me in my life, and I must take the opinion of one of the other judges upon it.

HIS HONOR (on the following day) said: This is an application by the plaintiffs for discovery. The summons is the baldest I have ever seen. It is said to be an omnibus summons under Order XXX., rule 1. I do not see anything in the nature of an omnibus summons in it. If it is anything it is an application under Order XXXI., rule 12, for discovery. If so it ought to be made *ex parte*. The practice is that when a party wants either discovery or leave to deliver interrogatories, he should proceed *ex parte* unless he applies under a general summons for directions. The summons is too vague, it does not appear what the discovery is for, whether for documents or otherwise. I dismiss this application.

Solicitors: For plaintiffs, *Malleson, England* and *Stewart*.

June 2.

HEARTY AND ANOTHER v. GILLESPIE AND ANOTHER.

Pleading—A party cannot join issue and plead matters which would be comprised in the joinder of issue.

Application on behalf of the defendants that the 2nd, 3rd, and 4th paragraphs of the plaintiffs' reply to the defence and counter-claim be struck out as being merely a repetition of joinder of issue, and that issue be joined, and that the defendants be allowed to further plead under Order XXIII., rule 2.

The plaintiffs were the trustees of John Stevens and William Torr, and claim against the defendants for work done and materials provided by the plaintiffs for the defendants at their request.

The defendants in substance pleaded—

1. That the work sued for was done under a contract in writing made between Stevens and Torr and the defendants, by which Stevens and Torr agreed to do the work in a good and workmanlike manner, according to certain plans, &c., and that the work was to be done to the complete satisfaction of the Clerk of Works.

3. The work was not done by Stevens and Torr in a good and workmanlike manner, according to the plans, &c., nor was it satisfactorily completed or passed by the Clerk of Works, nor done to his entire satisfaction.

4. In addition to the amount credited by the plaintiffs as having been paid to Stevens and Torr, the defendants claim to be credited with £123 for materials supplied.

9. In the alternative as to the whole action the defendants have paid into court £30, and say that sum is enough to satisfy the plaintiffs' claim.

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To this the plaintiffs replied—

1. They join issue on paragraphs 1, 2, 3, 5, 6, 7, and 8 of the defence.

2. As to paragraphs 1 and 3 they further say it never was a condition of the contract referred to, that it had to be done to the entire satisfaction of the Clerk of Works.

3. As to paragraph 4 the defendants are entitled to credit to the amount of £670, and no more as endorsed in the writ herein.

4. As to paragraph 9 the sum of £30 is not enough to satisfy their claim.

MR. HOOD in support; MR. FINK to oppose.

HIS HONOR said: I think that paragraphs 2, 3, and 4 of the reply would all be comprised in the joinder of issue. I think the plaintiffs ought either to have simply joined issue, or have pleaded these paragraphs without joining issue. I do not say which they ought to have done. I allow the summons with costs, and certify for counsel.

Solicitor: For plaintiffs, *Read;* for defendants, *Daly.*

M'AULEY v. BEATTY. June 2, 5.

Rules of Supreme Court 1884, *Order XVIII., rr.* 8, 9—*Joinder of causes of action—Discretion of judge—Joinder of action of* devastavit *with action for goods sold and delivered or for money received allowed.*

Application on behalf of the defendant that paragraph 3 of the statement of claim herein be struck out, and that the cause therein alleged be excluded from this action, and that this action be confined to the causes of action alleged in paragraphs 1 and 2 of the said statement on the grounds—

1. That the cause of action therein alleged could not exist until after the causes of action alleged in paragraphs 1 and 2 of the said claim have been decided against the defendant, and the judgment thereon unsatisfied.

2. And in the alternative, that the cause of action therein alleged cannot be conveniently tried or disposed of together with the causes alleged in paragraphs 1 and 2.

The statement of claim was as follows:—

1. The plaintiff's claim is against the defendant as administratrix of John Beatty, deceased, intestate, for the price of goods sold and delivered by the plaintiff to the said John Beatty.

2. In the alternative, the plaintiff's claim is against the defendant as such administratrix as aforesaid for money received by the said John Beatty for the use of the plaintiff, and as his agent for the sale of the said goods.

Then followed particulars under paragraphs 1 and 2, balance due, £311 1s. 1d.

3. In the event of the plaintiff obtaining judgment under paragraph 1 or paragraph 2 hereof, he also sues the defendant personally for having, after the death of the said John Beatty, eloigned, wasted, converted, and disposed of to her own use portion of the real and personal estate of the said John Beatty, which portion was of the value of £311 1s. 1d. at the least, and came to the hands of the defendant as such administratrix as aforesaid to be administered, in consequence whereof the plaintiff is unable to obtain satisfaction or payment of his said judgment or any part thereof.

The plaintiff claims—

1. Against the defendant as administratrix, £311 1s. 1d.

2. Against the defendant personally, £311 1s. 1d.

DR. MACKAY, in support: The 3rd paragraph is one for *devastavit*, and as such ought to be brought after judgment obtained on the 1st or 2nd paragraph (Williams on Executors, 7th ed., p. 1984). It would be absurd for the plaintiff to accuse the defendant of wasting the goods until it has been proved that the goods are his (2 Chitty's Pleadings, 7th ed., p. 340). The action of *devastavit* will not lie without a judgment against the executor or administrator (Chitty's Practice, 14th ed., 1124).

MR. ISAACS, to oppose: As a rule of practice the Common Law Courts required that there should be judgment before an action for *devastavit* would lie. This is only a rule of practice. Sec. 8, sub-sec. 7, of the Judicature Act 1883 provides that the Court, in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to such Court shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. This section overrides the old rule of practice. If this summons were allowed the plaintiff would first have to bring his action on the first two paragraphs and then bring a second action on the third paragraph.

HIS HONOR said: The summons in this case was taken out by the defendant to strike out paragraph 3 of the statement of claim on the grounds, 1st, that the cause of action therein alleged could not exist until after the causes of action alleged in paragraphs 1 and 2 of the said claim had been decided against the defendant and the judgment thereon unsatisfied; and 2ndly, that the cause of action therein alleged cannot be conveniently tried or disposed of together with the causes alleged in paragraphs 1 and 2. I have some doubt on this point chiefly on the second ground stated in the summons. The new practice gives me power to disallow a joinder of causes of action if in my opinion the joinder would be inconvenient. I am

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not satisfied now, but I am hardly prepared to declare the joinder in this case inconvenient. To the two paragraphs there is joined a claim of *devastavit*. That claim can only arise first on judgment being recovered, and secondly where there had been no amount to satisfy that judgment if obtained. Upon that ground it appeared to me at first that it would be more convenient to try the cause of action first and then to try the *devastavit*, but upon reflection and with some doubt I think that the joinder in this case would not be so inconvenient as to warrant me in disallowing it. If the case be tried with a jury it will be the duty of the presiding judge to tell the jury that, if they should find for the plaintiff on the 1st or 2nd paragraphs and are of opinion that there will not be sufficient to satisfy their finding and that such insufficiency has arisen from the wrongful act of the defendant, they can find for the plaintiff on the 3rd paragraph, but, on the other hand, although they may find for the plaintiff on the 1st and 2nd paragraph, yet if they think there will be sufficient to satisfy their finding, or that the insufficiency has not arisen from the wrongful act of the defendant they must find for the defendant on the 3rd paragraph. Under the old practice this joinder of causes would not be admissible, but for the reasons above I think with some doubt that it may be allowed under the present practice. I dismiss the summons without costs, and certify for counsel as between attorney and client.

Solicitors: For plaintiff, *Cleverdon;* for defendant, *Briggs* and *Snowball.*

(Before His Honor Mr. Justice Higinbotham.)

FREETH v. HINES. June 3.

County Court Statute 1869 (*No.* 345), *sec.* 39—*This section relates only to actions commenced in the County Court.*

Application by consent to have this action tried in the County Court.

MR. FARMER stated that the action was one for slander by which the plaintiff sought to recover £500 damages from the defendant. The action was an up-country one. and was set down for trial in the Supreme Court but was not dealt with by reason of a judge of the Supreme Court not having gone on that circuit. The parties have consented to the action being tried in the County Court so as to enable them to have the matter disposed of more quickly. The application is made under section 39 of the County Court Statute which provides that the County Courts shall have jurisdiction to hear and determine all personal actions where the amount, value, or damages, sought to be recovered shall be more than the sum of £250 if both parties or their respective attorneys shall in writing under their hands consent thereto.

HIS HONOR said: I cannot grant this application even though consented to. Section 39 of the County Court Statute relates only to actions commenced in the County Court. If the parties wish the action tried in the County Court they can consent to stay the proceedings in the Supreme Court, and commence the action afresh in the County Court.

Solicitors: For plaintiff, *Levinson;* for defendant, *Farmer.*

(Before His Honor Mr. Justice Williams.)

TURNBULL v. MILES. June 4.

County Court Statute 1869 (*No* 345), *sec.* 43—*Applications under sec.* 43 *of Act No.* 345, *should be made before a defendant has delivered his statement of defence* (Robertson v. Brown 6 *A. L. T.* 46, *corrected*).

Application on behalf of the defendant under sec. 43 of the County Court Statute.

MR. MITCHELL in support.

MR. ISAACS, to oppose: I have to take a preliminary objection. In this case the plaintiff has delivered his statement of claim. I submit that the defendant cannot make this application after the plaintiff has pleaded on the authority of *Robertson v. Brown*, 6 A. L. T. 46, where your Honor is reported to have said, "The proper time to make an application of this nature is immediately after the service of the writ, and before any pleadings are delivered."

HIS HONOR said: I do not think I said so; it ought to be before plea pleaded. If a defendant as in this case, makes this application before he delivers his statement of defence I think he would be in time. I overrule the objection.

Solicitors: For plaintiff, ; for defendant, *F. G. Smith.*

TOOTH AND OTHERS v. NATHAN. June 4.

Rules of Supreme Court 1884, *Order XIV.*, *r.* 1—*Rule* 1 *of Order XIV. only applies to cases where a writ is specially endorsed, and a judge has no power to make an order under that rule unless the writ is a specially endorsed one.*

Application on behalf of the plaintiffs for leave to sign final judgment under Order XIV., rule 1.

The writ was endorsed as follows:—

The plaintiff's claim is for amount of defendant's dishonored cheque and interest thereon and for the price of goods sold and delivered.

Then followed particulars.

MR. NATHAN, on behalf of the defendants, objected on the ground that the writ was not a specially endorsed writ under Order III., rule 6., as it did not state that the cheque was presented and dishonored, as it ought to have done (*Turnbull v. Nathan*, 6 A. L. T. 139), and that consequently final judgment could not be entered on such endorsement under Order XIV., rule 1.

It was admitted on behalf of the plaintiffs, that the writ was irregularly endorsed but it was submitted that, as the defendant had entered an appearance to such writ, he had waived the

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irregularity and that the plaintiffs were entitled to proceed as if the writ had been regularly endorsed.

MR. NATHAN, in reply, stated that the writ was a perfectly good writ as an ordinary one, and the defendant had appeared to such ordinary writ and not to such writ as a specially endorsed writ.

HIS HONOR said: This is not a specially endorsed writ—Order XIV., rule 1., only applies to cases where the writ is specially endorsed. I have no power to order for final judgment in this case. I dismiss the summons without costs.

Solicitors: For plaintiffs, *Macgregor* and *Brahe*; for defendant, *Nathan*.

LANE AND OTHERS v. HENSHAW. June 5.

Party made plaintiff without his consent—The name of a plaintiff having been inserted in a writ of summons without his authority, his name was ordered to be struck out with costs, as between solicitor and client, to be paid by the solicitor inserting it—Such solicitor was likewise ordered to pay the costs of the defendant.

Application on behalf of one of the plaintiffs, Lane, that his name may be struck out of the writ of summons and all subsequent proceedings in this action; the said writ of summons having been issued without his authority and that Mr. James Boyd, the solicitor by whom the said writ of summons was issued, may be ordered to pay to the said Lane his costs, if any, of this action, and his costs of and occasioned by this application to be taxed as between solicitor and client.

Boyd did not appear.

It was stated on behalf of the applicant that the application was made on the authority of *Lane v. Goold*, 8 V. L. R. (E.) 236.

Costs were asked for on behalf of the defendant on the authority of *re Savage*, 15 C. D. 557.

HIS HONOR said: I will grant the application as asked. I likewise order that Boyd pay the defendant's costs.

Solicitors: For Lane, *Moule* and *Seddon*; for defendant, *Kidston*.

June 5.

M'VEAN AND ANOTHER v. MILLER.

Rules of Supreme Court 1884, *Order XIV.*, *r.* 1—*Appendix A*, *Part* 1, *No.* 2—*A specially endorsed writ should be headed "Statement of Claim," and should be signed.*

Application on behalf of the plaintiffs for leave to sign final judgment under Order XIV., r. 1.

MR. HOOD, in support.

MR. HODGES, to oppose: The writ in this action is endorsed as follows:—

"The plaintiffs' claim is against the defendants as managers of a promissory note for £1000, dated the 2nd day of August, 1884, payable six months after date."

This is not a specially endorsed writ, and therefore the plaintiffs cannot apply under Order XIV., r. 1. Appendix A, Part 1, No. 2 gives the form for a specially endorsed writ. This form shows that a specially endorsed writ should be headed "statement of claim" and should be "signed." This writ has not this heading, nor is it signed. A specially endorsed writ is a pleading and as such requires to be headed and signed.

MR. HOOD: The defendant cannot take this objection now; he has entered an appearance and has thereby waived any irregularity there may be in the writ. If Mr. Hodges' contention is good, I ask leave to amend under Order LXX., r. 1.

MR. HODGES: The writ is a perfectly good one as an ordinary writ, and the defendant has appeared to it as being an ordinary writ.

HIS HONOR said: I have to see the writ and to satisfy myself that it is a specially endorsed writ. Order XIV., r. 1, is governed by the words where the defendant appears to a writ of summons "specially endorsed." If the writ is not specially endorsed a plaintiff cannot apply under Order XIV., r. 1, for liberty to enter final judgment. I do not think this writ is a specially endorsed writ, and consequently the plaintiffs cannot succeed in this application. I will give the plaintiffs leave to amend on payment of the costs of the amendment.

Solicitors: For plaintiffs, *Klingender*, *Charsley* and *Dickson*; for defendant, *Madden* and *Butler*.

June 9, 10.

PECK AND OTHERS v. THE LAND MORTGAGE BANK.

Rules of Supreme Court 1884, *Order XXXI.*, *r.* 12—*Application for discovery of documents—Proceedings stayed by a previous order—An application for discovery of documents is not a "proceeding" and can be made although all proceedings in the action are ordered to be stayed.*

Application on behalf of the plaintiffs for directions that the defendants do within three days from the date of the order to be made on this summons answer an affidavit stating what documents are or have been in their possession or power relating to the matters in question in this action, and that in the mean time all further proceedings herein be stayed.

MR. NEIGHBOUR, in support.

MR. MITCHELL, to oppose: The only objection to this application is a preliminary one. The following order was made in this action by Mr. Justice Higinbotham on a similar application on behalf of the defendants, "That the plaintiffs do within three days from the date of this order answer an affidavit stating what documents are or have been in their possession or power, or in the possession or power of all or any of them relating to the matters in question in this action; and that in the meantime all further proceedings herein be and the same are hereby stayed." This order was made on the 27th May last, and the plaintiffs have not complied with it, consequently, as all proceedings are stayed, they cannot make this application.

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until they have complied with the former application.

His Honor said: As at present advised, I do not think that an application for discovery of documents is a *proceeding*. Under the old practice an application for interrogatories was held not to be a proceeding. I will confer with the other judges.

His Honor, on the following day, said: I have mentioned the matter to Mr. Justice Higinbotham, and he agrees with the conclusion arrived at by me yesterday, viz., that where proceedings are stayed under an order that proceedings there mean something in the nature of a step forward in the action, and that an application for interrogatories or for discovery of documents is not a step in the action and consequently cannot be a *proceeding*. As this was the only objection raised to the application I allow the summons, costs to be costs in the cause. I certify for counsel.

Solicitors: For plaintiffs, *Bardwell*; for defendants, *Macgregor* and *Brahe*.

PRACTICE COURT.

(Before His Honor Mr. Justice Higinbotham.)

May 5, June 8.

Reg. v. Scarlett, *ex parte* Lunny.

Local Government Act 1874 *(No.* 506*), secs.* 52, 71, 73, 257—*Ouster—The occupier of a house is the person liable to be rated, and is thereby qualified to hold the office of councillor.*

Rule *nisi* to oust John Scarlett from office as councillor of the Murray Riding of the Shire of Towong, on the ground that he was not qualified as a ratepayer to be elected. It appeared that at the annual election in August last Mr. John Pooley was elected as councillor for the riding, but on the 19th December he was ousted from office by the Supreme Court, and a new election was held in January last. At this election Scarlett was elected, as against Pooley, the other candidate. It was urged that Scarlett was not eligible to be elected, as he was not liable to be rated in respect to property in the shire. He was in the employment of a mining company, and he and another person resided on the company's property. They were entered on the rate-book as ratepayers, and their names appeared on the ratepayers' roll. It was contended as against Scarlett that he was merely a servant of the company, and that he was not liable to be rated. On the other hand, it was submitted that, as occupier of the premises, he was liable to be rated, that he had been on the ratepayers' roll for years, that he had acted as councillor for three years, and if there was any objection to his qualification it should have been made at the revision court.

Mr. Hodges moved the rule absolute; Dr. Madden showed cause.

His Honor, in giving judgment, said: This was a rule under section 71 of the Local Government Act 1874, to oust John Scarlett from the office of councillor for the Murray riding of the Shire of Towong, on the ground that at the time he was elected a councillor for the riding he was not liable to be rated for any property within the municipal district of the shire. It appears from the affidavits which have been furnished since the rule was granted, that Mr. Scarlett was at the time of his election the sole inhabitant occupier of the rated tenement. As such inhabitant occupier he, and not the company in whose service he was, was liable to be rated (sec. 257); and he was also entitled to be enrolled (sec. 73). Being liable to be rated, he was qualified to hold the office of councillor of the municipality (sec. 52). The rule will be discharged with costs.

SUPREME COURT.

Sittings in Banco.

(Before their Honors Mr. Justice Higinbotham, Mr. Justice Williams, and Mr. Justice Holroyd.)

Sanderson v. Fotheringham. June 2.

Common Law Procedure Statute 1865 *(No.* 274*), sec.* 429—*Landlord and Tenant Statute* 1864 *(No.* 192*), sec.* 84—*Costs—Action in trespass for impounding sheep—Damages less than £10 recovered—Certificate of judge—Meaning of sec.* 84 *of Act No.* 192.

Appeal from an order of a judge in Chambers setting aside an allocatur by the prothonotary allowing plaintiffs' costs in an action against the defendants. The plaintiffs had sued the defendants for illegally impounding some cattle of theirs, and had obtained a verdict for £72, which the Full Court afterwards reduced to £2. The plaintiffs did not obtain an order allowing them Supreme Court costs, but they contended that they were entitled to full costs without the order of a judge, on the ground that the Landlord and Tenant Statute, section 84, provided that where any distress shall be made for any rent or sum justly due, and any irregularity or unlawful act shall be done by the person causing the distress, the distress shall not be deemed unlawful nor the distrainer a trespasser *ab initio*; but the party grieved may recover satisfaction for the damage in a special action of trespass or on the case, at the election of the plaintiff, and if he recover he shall have full costs. The prothonotary agreeed with the plaintiffs, and allowed them full costs, but his decision was afterwards set aside by a judge in Chambers. It was submitted by the plaintiffs that they were entitled to their costs.

Dr. Madden and Mr. Barrett appeared for the plaintiffs; Mr. Hodges and Mr. Leon for the defendants.

Mr. Justice Higinbotham said: This is an appeal from an order made by my brother, Williams, setting aside the taxing officer's allocatur for £355 6s. 10d., plaintiff's costs on the first count of the declaration. The Court directed a verdict to be entered for the defendant on the second count. The plaintiff obtained a verdict on the first count, but

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the damages on that count were reduced to £2, the amount found by the jury to represent the improper treatment and excessive driving of the plaintiff's sheep by the defendants, as alleged in the new assignment. The taxing officer thought that the plaintiff was entitled by virtue of sec. 84 of the Landlord and Tenant Statute 1864 to full costs on the first count, and he taxed these at the amount above stated, and the defendants' costs on the second count at £49 2s. 3d. We are or opinion that the allocatur for the plaintiff on the first count was properly set aside. The first count of the declaration in this case was the ordinary count in trespass for impounding the plaintiff's sheep. The plaintiff, having recovered under this countless damages than £10, would not be entitled under 3 and 4 Vict., c. 24, and the Common Law Procedure Statute, 1865, sec. 429, to any costs whatever in respect of such verdict, unless the judge before whom the verdict was obtained had immediately afterwards entered a certificate on the record that the action was really brought to try a right, or that the trespass was wilful and malicious. This certificate was not granted by the judge. Then it has been contended for the plaintiff that this action is "a special action of trespass or on the case" within sec. 84 of the Landlord and Tenant Statute 1864, which provides that "the party aggrieved may recover satisfaction for the damage in a special action of trespass or on the case, at the election of the plaintiff, and if he recover he shall have full costs." The meaning of these words, "a special action of trespass or on the case," is not very clear. They appear for the first time in 15 Vict., No. 4, sec, 9. The English Act II., Geo. II., c. 19, sec. 19, is more intelligible. It provides that "the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they may have sustained thereby, and no more, in any action of trespass, or on the case, at the election of the plaintiff or plaintiffs;" that is to say, the plaintiff must bring an action of trespass if the irregularity be in the nature of an act of trespass, and an action on the case if it be in itself the subject matter of an action on the case (*Messing v. Kemble*, 2 C. 115.) It is clear, I think, that in order to entitle himself to full costs the plaintiff must, under the terms either of the English or of the colonial act, make the particular irregularity, or the particular unlawful act complained of, the basis of his action; it must be set forth in the declaration The plaintiff has not done so in the present case. The improper treatment and excessive driving of the sheep, assuming them to have been lawfully seized as a distress, is an indirect injury, which could not be the subject of an action of trespass, but could only be sued for in an action on the case. But a direct trespass is the subject of the declaration in this case, the indirect injury is only set up in the new assignment. This action is, therefore, not a special action, or an action on the case brought to recover satisfaction for the special damage, and the plaintiff is not entitled to full costs under sec. 84. I rest my judgment solely on this ground. The argument we have heard has strengthened the view I have already expressed (10 V. L. R., 297) that the effect of sec. 84 of the Landlord and Tenant Statute 1864 has been to render the rule in *The Six Carpenters' Case* no longer applicable to the case of *distress damage feasant*. The Act 15 Vict., No. 10, applied to all cases where "a power of distress was reserved or given by any deed or other instrument or given by law." These latter words, "or given by law," can refer only to cases of *distress damage feasant*, and distresses levied for penalties imposed by Act of Parliament, and they explain the reason for inserting the words "or sum" in the 9th section of that Act. The sufficient amends which the owner of trespassing cattle was bound at common law to estimate and to tender, and the trespass rates which he is bound under the statute to pay for the cattle impounded before he can release them, constitute "a sum justly due" to the distrainer, and it is not inappropriate, I think, to say that the distress is made for such sum. These words, "or sum," have no meaning at all if they do not apply to other sums than sums due for rent, and they cannot be deprived, in my opinion, of the meaning they undoubtedly bore in the Act from which they were copied, because they are now found in a new consolidating Act in a part of that act entitled "Distress for Rent." The appeal will be dismissed with costs.

MR. JUSTICE WILLIAMS agreed with the judgment that this was not a special action of trespass, or on the case. But he was of the same opinion as he had been in Chambers, that a distress of sheep *damage feasant*, in other words, a distress of sheep for trespassing on the land of the distrainor, could not be fairly said to be distress for rent due. It seemed to him not to require explanation, but the mere statement of the fact that the sheep were distrained for trespassing, doing damage, at once carried with it a statement that they were not distrained for rent due. On the other point, whether it was for a sum justly due, he was not quite so clear as he had been when the case was before him in Chambers. But he was disposed to think that "a sum justly due" meant some money *ejusdem generis* with rent, as a mortgage or something of that description. The plaintiff had failed to establish any one of the matters that the section required to enable him to obtain costs.

MR JUSTICE HOLROYD concurred that this was not a special action of trespass. He had some doubt whether "a sum justly due" should be *ejusdem generis* with "rent" or not. But he thought a distress of cattle *damage feasant* was not a distress for a sum justly due or for any sum. This distress was for a trespass and not for the purpose of recovering rent or a sum due.

Appeal dismissed with costs.

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June 2.

LONDON v. SHIRE OF WODONGA.

Local Government Act 1874 (*No.* 506), *sec.* 169 (*sub-sec. III.*), 260—*A person who seeks to enforce a claim founded upon an alleged contract with a municipality, must prove that a valid contract, based on good consideration, has been made with him by the council; that such contract is for a purpose authorised by the Act, and that it has been made in the form or mode prescribed by the Act, as an essential condition of contracts by which the ratepayers shall be bound—The insertion in the estimate required by sec.* 260 *of a sum alleged to be required for a purpose not lawful, as not being some one of the purposes sanctioned by the Act, would not bind the municipality, and would not justify the payment of the sum by the council out of the municipal fund.*

Appeal from the County Court, Wodonga.

The plaintiffs, Mr. Henry London and Mr. R. H. Shakespear, sued the Shire of Wodonga to recover the sum of £75, as commission due to them for superintending the construction of work done for the Shire of Wodonga. In 1877 Mr. London was appointed engineer and superintendent of works for the Shire of Wodonga. The shire council had advertised for applications for that position, asking the applicants to state what salary they required, or, if they wished to be paid by commission, to state what percentage they required on the revenue. The annual revenue was stated to be £1700. The plaintiff (Mr. London) asked for £125 a year, or a commission of 9 per cent. on the revenue. He was appointed at a fixed salary of £135 per annum. At that time he was not a certificated engineer, as required by the Local Government Act. In 1880 the shire council applied for a special grant from the Government, for road works in the shire, and the sum of £2000 was voted. The plans were signed by Mr. London, and by Mr. R. H. Shakespear, the latter a certificated engineer. On the £2000 the shire council paid Mr. London £100, being at the rate of 5 per cent. Subsequently Parliament granted to the council another sum of £1500, which was expended. On this Mr. London also claimed 5 per cent. for superintending the works. The council in 1883, refused to pay it, contending that under the terms of the contract with Mr. London, made in 1877, he was bound to superintend all the municipal works in the shire, and that they had nothing to do with Mr. Shakespear, who had merely a private understanding with Mr. London. Mr. London is now a certificated engineer, and is employed by the shire of Yackandandah. At the trial of his case in the County Court, before Judge Casey and a jury, the plaintiffs were nonsuited and they appealed. It was conceded that Mr. Shakespear could not sue the council, and it was agreed to strike his name out of the plaint.

MR. HODGES for the appellants; MR. BOX for the respondents.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said: This was an appeal from the County Court at Wodonga. We are of opinion that the decision of the learned judge of the County Court in nonsuiting the plaintiff was correct, although it cannot be supported on the authority of the cases which were cited in the County Court. The plaintiffs, or rather the plaintiff, Henry London, who, it was conceded in the arguments, ought to have sued alone, claimed the sum of £75 and interest from the defendants, being 5 per cent. commission on a special grant of £1500 from the Victorian Government to the defendant municipality for road construction within the shire in payment of services rendered by the plaintiff to superintending the expenditure of such grant. We do not think that this claim could be enforced under the terms of the plaintiff's original agreement with the defendants. It appears that the plaintiff was engaged in January, 1877, as engineer and superintendent of works for the Wodonga shire, to design and superintend the public works of that shire at a salary of £135 per annum. Prior to his appointment, the council publicly invited applications for the office, and announced that the revenue of the shire was estimated at £1700. This announcement was doubtless intended to acquaint applicants with the probable extent of their duties, and it might have the effect of misleading them, but it cannot control the express terms of the agreement under which the plaintiff subsequently accepted the office of engineer or superintendent, and undertook to design and superintend the public works of the shire for a fixed annual salary. The plaintiff was bound in our opinion, by this agreement to design and superintend as engineer the public works of the shire, whatever may be the meaning these words bear in the agreement. Assuming that there were public works in the shire outside of this agreement, and that the plaintiff could not have been required to design or superintend such works for his salary, it was necessary, in order to substantiate his claim for payment for such other works, that he should prove some new agreement with the council of the defendants. The municipal fund can only be expended on or applied to purposes authorised by the Act of Parliament, and it is absolutely necessary that a person who seeks to enforce in a court of justice a claim founded upon an alleged contract with a municipality, should prove that a valid contract, based on good consideration, has been made with him by the council, that such contract is for a purpose authorised by the Act, and lastly, that it has been made in the form or mode prescribed by the Act, as an essential condition of contracts by which the ratepayers shall be bound (*Shire of Gisborne v. Murphy*, 7 V. L. R. (L.), p. 63; *Shire of Leigh v. Shire of Hampden*, 8 V. L. R. (L.), p. 370). In the present case the plaintiff has to prove that a contract for the payment

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to him of five per cent. on the amount of the special grant had been entered into by the council, in accordance with the mode prescribed by section 169, sub-section III., that is to say, either at a meeting of the council with the assent of the majority of a quorum of the council, or by two councillors directed by and on behalf of the majority of a quorum. No direct evidence whatever was given that such a contract was ever made. In the year 1881, the plaintiff made a claim on similar grounds to a present for the sum of £100, and this was admitted and paid by the defendants. But the admission is no evidence of a contract to pay further claims of the same nature. The sum now demanded by the plaintiff (£75) was entered under "liabilities" as an amount "due" to the plaintiff in the annual estimate of assets and liabilities of the shire for the year commencing October 1, 1883, and this estimate, including the sum of £75, was adopted and confirmed by the council by a resolution under the seal of the municipality on December 29, 1883. It has been argued that this is some evidence by way of admission that a valid contract in the requisite form had been entered into, and that, therefore, the case ought not to have been withdrawn from the jury. But we think that this statement cannot bind the municipality. The municipal estimate is a statement required by the Act of Parliament (section 260) to be prepared by the council before a rate is made, showing the various lawful purposes for which money is or may be required by the municipality together with the sums already available for such purposes. The insertion in the estimate of a sum alleged to be required for a purpose not lawful as not being some one of the purposes sanctioned by the Act, would not bind the municipality, and would not justify the payment of that sum by the council out of the municipal fund. The most express statement by the council that a claim is a lawful claim would not make it lawful; and if it be not lawful it cannot be satisfied. This Court will compel a municipality by *mandamus* to levy a rate for the purpose of discharging obligations it has lawfully incurred by contract or otherwise within the purposes of the Act from which its powers are derived (*Reg. v. Shire of Oakleigh*, 10 V. L. R. (L.), p. 67) but it will not impose upon a municipality the obligation of satisfying a claim which is not proved to be made in respect of a purpose for which the council is authorised to expend the municipal fund, and to be clothed in the form expressly required by law. The plaintiff has adduced no evidence of a contract valid in substance or in form made with the municipality. The nonsuit, therefore, was right, but under the circumstances disclosed in the case we give no costs of the appeal.

Appeal dismissed without costs.

June 2.

KILPATRICK v. THE MAYOR, ETC., OF PRAHRAN.

Local Government Act 1874 *(No.* 506*), secs.* 377, 405, 408, 409, 410, 413—*Cutting down street which had been previously levelled—A municipal council has power to raise or lower the soil of any street, but before it does so it must fix the level of every such street, and it must fix the level in such a way as to enable persons who might fear or who might experience injury from the act of the council, to appeal—Meaning of words "level" and "paved" in sec.* 408.

This case came before the Court for argument on points reserved at the trial. The plaintiff, Mr. Thomas Kilpatrick, who is the owner of some house property having a frontage to High-street, Prahran, sued the defendants for damages for loss he had sustained in consequence of the defendants having, in 1884, cut down the street, the plaintiff's houses being left several feet above the new level. The defendants justified their act as having been done under the provisions of the Local Government Act 1876, section 377 of which provided that, "subject to the provisions of this Act the council of every municipality may, within any municipal district, from time to time open new streets or roads, divert any street or road, alter or increase the width of any street or road, or cause to be raised or lowered the ground or soil of any street or road." But the plaintiff replied that they could not alter the levels of a street without complying with the requirements imposed by the Act. In section 408 it was provided that one month at the least before fixing the level of any street which has not theretofore been levelled or paved, the council shall give notice by advertisement, to be twice inserted in some newspaper circulating in the neighbourhood, of their intention to fix the level thereof, which notice shall set forth the name and situation of the street the level whereof is to be fixed, and shall refer to plans of such intended work, and shall specify a place where such plans may be seen, and a time when and a place where all persons interested in such intended work may be heard thereupon. It was contended for the plaintiff that High-street had been levelled and paved since 1858, and, therefore, that the council could not make alterations in it without giving compensation to the owners of property affected by the alteration. It was also submitted that in this case, even if the street had not been theretofore levelled and paved, the council had not given the proper notices to enable them to fix the level. The first advertisement of the intention to fix the level was published in the *Argus* of the 12th January, 1884. An advertisement was published in a Prahran paper of the 18th January, 1884, and another advertisement was published in the *Argus* of a later date. The meeting of the council at which the new levels were fixed was held on the 18th February, 1884. It was submitted for the plaintiff that these advertisements

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did not comply with the requirements of section 408, as the advertisement had not been twice published in a newspaper at least a month before the meeting of the council. In reply to this, it was contended, on behalf of the council, that the levelling and paving referred to in the section was some work which the council had done under the provisions of the Act; and as regarded the advertisements, it was submitted that if one advertisement was published at least a month before the meeting of the council, it was sufficient, and it was not necessary that both advertisements should be published a clear month before the council meeting. The plaintiff also contended that the level of the street had already been fixed by a previous municipal council in the year 1858, and that under section 413 of the Local Government Act the defendants could not alter the level without giving compensation. Section 413 provided that "If after the fixing of the level of any street, under the provisions of any law for the time being in force relating to local government, the council of any municipality alter the level of the ground in such street, save to conform to the level so fixed, the municipality shall make full compensation to all persons interested in any property injuriously affected by such alteration, and the same may be recovered by an action for damages in any court of competent jurisdiction." It was also submitted that the statute only gave power to the council to alter the levels, and did not impose any obligation on it to do so, and therefore if it made an alteration it should not do so in such a way as to cause a nuisance. At the trial the jury gave a verdict for the plaintiff for £490 9s. 6d., and the questions of law involved were reserved for the Full Court.

Mr. Webb, Q.C., Mr. Purves, and Mr. Hood appeared for the plaintiff; Dr. Madden and Mr. Hodges for the defendants.

Mr. Justice Higinbotham, in giving the judgment of the Court said: The question for the determination of the Court was whether the plaintiff was entitled to retain the verdict that had been given for him. The plaintiff was the owner of property having a frontage to high-street, in the city of Prahran, and the injury that the plaintiff complained of resulted from the act of the defendants in cutting down that street. The defendants justified what they had done under the authority of the Local Government Act, No. 506, which empowers the council of every municipality from time to time among other things to cause to be raised or lowered the ground or soil of any street or road subject to the provisions of the Act. It was not necessary in this case to consider whether it was an authority coupled with an injunction to exercise the powers conferred by the Act. It was clearly an authority given to the council, but it was an authority which must be exercised subject to the provisions of the Act. Now what were the provisions in the Act which limited the power to raise or lower the ground or soil of any street or road? The first and great limitation was in section 408, which excepted from the exercise of these powers by the council streets which had theretofore been levelled or paved. This limitation required that where a street had not been theretofore levelled or paved the powers of the council as to fixing a level were to be exercised, under the provisions of sections 405, 409, 410, and 413 of the Act. The council had power to raise or lower the soil of any street, but before it did so it must fix the level of every such street, and it must fix the level in such a way as to enable persons who might fear, or who might experience injury from the Act contemplated by the council, to appeal first to the council itself, and then, if the council did not entertain the appeal favourably, to appeal to the General Sessions. The appeal was given not to provide compensation for the Act contemplated by the council, but to prevent that Act being carried into effect. The council is to hear the appeal first, and if it refuses to entertain it, then the person who fears injury to his property could appeal to the General Sessions, and the Sessions could either confirm, quash, or vary the order of the council. That order was that the council might raise or lower the soil of any street, but it could only raise or lower the soil so as to conform to the level fixed by the order. These were important limitations to the general powers of the council to raise or lower streets. In the first place a large number of streets were at once excepted from the provision, and next as to those that were within the scope of the council's authority, the inhabitants were protected by the obligation cast upon the council to take steps to enable persons who complain of being injured to protest against the step being taken by the council, and finally the council were limited to raising or lowering the street to the level fixed by the order. These provisions appeared to provide sufficient protection for all persons who might apprehend danger from the act of the council. Then what were the streets excepted from the power of the council? They were streets which have not theretofore been levelled or paved. As to the word "level," it was said for the defendants that it had reference to a general system of fixing levels throughout a borough. And there could be no doubt that it was the intention of the Legislature in this Act to recommend, if not to enjoin, upon all boroughs to establish a system of a borough level. This was also apparent from the provisions of section 405 of the Act. But he did not think that the word "level" in section 408 would bear that meaning. The word in that section meant, he thought, a level in fact. And any act or series of acts done by a council might indicate an intention on the part of the council that the street should after these acts were done be used at the level then fixed. It was a question of fact for a jury in each case. It was not necessary that the levelling should

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extend to the whole of the borough. It appeared from the very language of the section that it might be confined to a particular street, and if the council did any acts in reference to a particular street which indicated an intention that thereafter the street should be used by the public at the level then made, that street will have been levelled within the meaning of section 408 of the statute. As to the word "paved" he thought also it should have a very general meaning. It was difficult to state what was its precise meaning where it was used in the different sections of the Act. But in section 408 it must be used in a general sense, and include every kind of process by which a hard smooth surface fit for traffic was produced. It was a term which would apply to the formation of the road or footpath, and include the carriage traffic and the footway for passengers. The next question was, had this street been "levelled" or "paved" before the council proceeded in 1884 to fix the level or attempt to fix the level? He thought there was conclusive evidence that this street was "levelled" in the sense in which he had used the term. As far back as 1857 the council employed an engineer, who remained in their service till 1863, for the purpose of making plans and levels for a certain portion of this borough, and in particular to make levels and plans of this portion of High-street. It appeared upon the estimate of the council, which that body were bound under the Act 18 Vict., No. 15, to furnish. The council stated then that there were five miles of streets in the borough which had been formed on a permanent level, that a considerable part of the street was altered, one part being cut down and another being raised. These were facts from which the inference could be drawn that the council of the then town of Prahran considered that this portion of High-street was fixed at a level which the council intended should be a permanent level. If so, the present council could not proceed to fix levels under sec. 408 of the present Act without exceeding the powers given to it. But there was another ground on which the defendants had failed to support their defence. Assuming that it was not levelled or paved, and there was abundant evidence that the whole of this street was subject to a process by which it was smoothed and prepared for traffic, and that from that time it had been used for that purpose; but, assuming that it did not come within that definition, the defendants had failed to show that they had fixed the levels in the manner prescribed by the statute. They were bound to fix the levels in such a way as to give to the inhabitants a right of appeal. They were bound to give notice, one month at the least, before fixing the levels, by advertisement to be twice inserted in a newspaper, of their intention to fix the levels. "One month, at the least," meant one clear month. The evidence here showed that only one advertisement was published in the time, and the insertion of the double advertisement was an essential part of the notice. It was not necessary to refer to the decision in the case of *King v. The Mayor of Kew*, because that was a case where the levels were not fixed, and the present case stood upon a different ground from it. The plaintiff had made out his right to maintain the verdict for £490 9s. 6d.

June 4.

THE QUEEN v. GEORGE NOBLETT.

Justices of the Peace Statute (Amendment) 1876, (No. 565), sec. 21—A statement taken in accordance with the provisions of sec. 21 of Act No. 565 can be read in evidence without previous medical testimony to show that the person making the statement was ill at the time such statement was taken—Such statement need not be signed then and *there by the justice taking the same.*

This was a special case stated by Judge Cope for the opinion of the judges of the Supreme Court.

MR. FISHER appeared for the prisoner; MR. CHOMLEY for the Crown.

The prisoner, George Noblett, was tried at the criminal sittings of the Supreme Court, at Melbourne, on the 15th April, before Judge Cope, on a charge of stealing in a dwelling-house. It appeared that the prisoner was engaged to act as a nurse to one William Perry, and it was alleged that whilst he was so employed he stole a sum of money from Perry's trousers' pockets. Perry had died before the trial, and his statement on oath, which purported to be taken under the 21st section of the Act No. 565, was tendered in evidence by the Crown, but objected to by the counsel for the prisoner—first, on the ground that before such a statement could be put in and read medical evidence should be called by the Crown to show that the deceased man was ill at the time such statement was taken; and, secondly, on the ground that the justice before whom it was taken did not subscribe it "thereupon," as required by the Act, and which, it was submitted, meant "then and there," without leaving the room, but (as it appeared on cross-examination) took it with him to the court-house, a distance of about a quarter of a mile, and as at rst stated, "within three minutes," but, subsequently changed to within a few minutes, of taking such statement, signed the same, and added thereto his reasons for taking it. Judge Cope overruled both objections, and admitted the statement reserving for the consideration of the judge of the Supreme Court the determination of the question as to whether his ruling was correct or not. The prisoner was found guilty, and sentence was passed. Section 21 of the Justices of the Peace Amendment Act No. 565 provided that, whenever it shall be made to appear to the satisfaction of any justice that any person dangerously ill, and in the opinion of some legally qualified medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, it shall be lawful for the justice

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to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto, by way of caution, a statement of his reason for taking the same, and of the day and place when and where the same was taken.

THE COURT held that the evidence was admissible, and confirmed the conviction.

May 13, 14; June 2.

THE KING'S BIRTHDAY CO. (REGISTERED) v. JACK.

Mining Companies Act 1871 (*No.* 409), *secs.* 50, 52, 54, 55—*Absolute forfeiture of shares—Calls—Upon absolute forfeiture of a share under sec.* 54 *of Act.* 409 *the person to whom the forfeited share belonged is relieved from liability to be sued for the call, the non-payment of which has occasioned the forfeiture, and he is exonerated further from liability to pay any calls subsequently made by the company. Under sec.* 52 *the manager alone can sue for the amount of a call within the fourteen days, and if that time is allowed to elapse, neither the manager nor the company can afterwards sue the person who owned the forfeited share, either for the first or any subsequent call upon it.*

Appeal from County Court, Dunolly.

MR. HELM and MR. M'INTYRE for the appellant (defendant); MR. TOPP and MR. BARRETT for the plaintiff (respondent).

The plaintiff company sued the defendant, James Jack, for £27 10s., for eight calls made on shares held by him in the company. The calls were made at intervals between December, 1883, and July, 1884. The questions involved in the case were, whether an action for calls could be brought in the County Court by the company after 14 days had elapsed from the time when the call was payable, and the second question was whether a shareholder who did not pay one call could be sued for that and subsequent calls. The judge of the County Court decided in favour of the company, and gave a verdict for the amount of the calls. The defendant now appealed.

MR. JUSTICE HIGINBOTHAM, in delivering the judgment of the Court, said: The plaintiff company sued the defendant in the Dunolly County Court to recover eight calls on the increased capital of the company, the first of which was due on December 12, 1883, and the last on July 9, 1884. The learned judge of the County Court gave judgment for the plaintiffs for the full amount claimed, with costs. Against that decision the defendant has appealed. It was a leading feature of the policy of the Mining Companies' Act 1871 to protect shareholders of mining companies and to reduce their liability within fixed limits of time and amount. With this object in view some new and striking provisions were introduced into that portion of the Act which relates to calls (sections 50 to 57). Thus calls are in all cases to be made payable on a particular day of the month, of which public notice is to be given, and upon no other day (section 50). A call is to be recoverable either in the County Court, or before any justice by the manager as a debt due to the company, provided (and this condition applies, in our opinion, to proceedings taken by the manager before a justice, as well as in the County Court), that proceedings be commenced within 14 days from the day when the call was payable (section 52). Then follows a very remarkable provision, viz., that any share upon which a call due is unpaid shall, at the expiration of 14 days after the date upon which the date shall be due, be absolutely forfeited, without any resolution of the directors or other proceedings—provided that no proceeding for the recovery of the call shall during such 14 days have been commenced; and where a proceeding is taken within that time the same consequence of absolute forfeiture of the share is to follow if the amount awarded shall not be paid or satisfied within 14 days after the judgment or order has been obtained (section 54). A forfeited share may be sold, and the proceeds applied in payment of the call and expenses (section 55). A company is not compelled to sell a forfeited share, but if it should take that course the person whose share has been forfeited may come in and redeem it up to and on the day previous to that on which it is intended to sell the share, by paying all calls upon it, *i.e.*, all such calls as would in the interim have become payable in respect of such share if it had never been forfeited, together with expenses and costs; and upon such payment the manager shall re-enter his name in the register, and such person shall be entitled to the share as if the forfeiture had not been incurred. These provisions, and the terms in which they are expressed, appeared to have been borrowed from the practice at law and in equity relating to the mortgage of real estates. The words "absolutely forfeited" are to be taken, we think, in their literal sense. The share is gone from the owner, who ceases to be a shareholder at the expiration of the time limited for payment of the call; he is then relieved from all liability for that as well as for future calls, but if the company exercises its option not to sell the share, he may, if he likes, come in at any time before sale, and regain the status of a shareholder. If, however, the company sell the forfeited share, the person to whom it belonged at once and finally loses all interest in it. Upon absolute forfeiture, the time of which is exactly defined, the person to whom the forfeited share belonged is relieved, in our opinion, from liability to be sued for the call, the non-payment of which has occasioned the forfeiture, and he is exonerated further from liability to pay any calls subsequently made by the company. The manager must commence proceedings within fourteen days from the day when the call is payable; if he omit to

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do so, and the share in consequence becomes absolutely forfeited at the end of that time, it would be contrary, we think, to the clearly-expressed intention of the legislature to hold that the company might at any subsequent time institute proceedings in its own name to recover the amount of the first or of any subsequent call. We think that the right of suit is given to the manager, and to the manager alone, and for a time which has designedly been made short; and that if that time is allowed to elapse, neither the manager nor the company can afterwards sue the person who owned the forfeited share, either for the first or for any subsequent call upon it. The view that we take of the general intention of the Act relating to calls cannot be reconciled with the last part of section 52, which provides that payment of any number of calls due by a shareholder may be enforced in one and the same proceeding before a justice. The cases of *Guthridge v. Gippslander G. M. Co.*, 5 A. J. R., p. 161; and *Regina v. M'Gregor, ex parte Wilkinson*, 6 V. L. R., p, 168, which followed the first-mentioned case, give effect to this provision, but they are admittedly at variance with the 54th section, which directs that the share shall be absolutely forfeited if the call is not paid within 14 days from the day upon which the call shall be due; and with the 56th section, which requires the manager to re-enter the name of the person who has redeemed the forfeited share in the register of shareholders. Re-entry implies a previous complete removal of the name from the register, or something tantamount to removal. The general intention of these sections of the Act relating to calls is, we think, plain, and such general intention must prevail against the particular intention of a portion of one of the sections inconsistent with and subordinate to it. The appeal will be allowed, but without costs.

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AN ANALYTICAL DIGEST

OF THE

CASES REPORTED IN THE AUSTRALIAN LAW TIMES REPORTS,

FOR THE YEAR 1884-5.

VOLUME VI.

Compiled by JAMES C. ANDERSON, ESQ., LL.B., *Barrister-at-Law.*

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——— (3.) sec. 308—Foreign judgment *in personam* — Execution in Victoria where judgment has been obtained in New South Wales against one member of a co-partnership on behalf of all the members—Execution can issue in Victoria against all such members upon the filing of a memorial of such judgment—Where a foreign judgment *in personam* is sought to be enforced in Victoria, such judgment is conclusive between all the original parties to the cause to the same extent as in the country where the judgment was obtained and is not examinable in our Courts except for defects apparent on the face of it, or upon extrinsic evidence adduced to show that the foreign Court had no jurisdiction, or that the judgment was obtained by fraud or manifest injustice; *Hogan v. Moore*, 156.

——— (4.) secs. 331, 334, 336, 339 — Imprisonment for Debt (Amendment) 1865 (No. 292), sec. 2 — Common Law Procedure (Amendment) 1865 (No. 290), sec. 4—A writ of "*capias ad respondendum*" cannot be issued after judgment—A writ of "*capias ad satisfaciendum*" may be issued, but no one can be arrested on it—The word "*capias*" in sec. 339 of Act No. 274 is a writ of "*capias ad respondendum*" only; *Union Bank v. Rinderman*, 87.

——— (5.) Sec. 388—See TAXATION OF COSTS (2; *Re Duffett and Manton*, 191.

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Companies' (Mining) Act 1867 (No. 324), sec. 9—No action can be brought against a member of an unregistered partnership for mining purposes upon a simple contract made by or with any other member of such partnership, on behalf of the same, unless such contract or memorandum thereof be in writing, and signed by the member sought to be charged; *Ex parte Kitchingman and Milton*, 246.

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——— (4.) Sec. 43 — Application for security for costs or for remission of action to County Court after issue joined—Time when such application ought to be made; *Robertson v. Brown*, 46.

——— (5.) Sec. 43—Application for remission of action to the County Court—Practice; *Tilley v. Hoyt*, 67.

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——— (10.) Sec. 43 — Applications under sec. 43 of Act No. 345 should be made before a defendant has delivered his statement of defence (*Robertson v. Brown*, 6 A. L. T. 46 corrected); *Turnbull v Miles*, 267.

——— (11.) secs. 72, 74, 76—Ejectment—Trial before a jury—Jurisdiction—An action of ejectment in the County Court cannot be tried by a jury—It does not fall within the three classes of exceptions to the rule that a judge of a County Court has the exclusive power to determine all questions of fact as well as of law. *Semble*, a trial so held is a nullity not an irregularity, and therefore cannot be allowed by consent; *Mason v. Ryan*, 152.

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——— (12.) secs. 100, 103 — A suit for redemption in which the sale of the mortgaged hereditaments is sought to be set aside is within the jurisdiction in equity conferred upon the County Court by sec. 100—A judge has a discretionary power under sec. 103, and will not order an action to be transferred to the County Court, if he think it a proper one to be tried in the Supreme Court; *Andrew v. Figg*, 86.

——— (13.) sec. 120 — County Court Rules, 269, 271 — Appeal — Appeal case irregularly drawn up — Respondent not agreeing to or dissenting from case prepared by appellant; *Grant v. Gilligan*, 10.

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——— (2.) **Liquidated**—Under an agreement not to carry on business for the space of five years under a penalty of £100, and not to start in the same line of business in a radius of eight miles, it was held that the penalty of £100 was to be considered as liquidated damages for the breach of the first part of the agreement; but that, as the second part did not contain any penalty, no damage could be recovered unless proved; *Bennetts v. Akehurst*, 242.

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——— (2.) **of Documents**—The £5 required by r. 26 of Order XXXI. to be paid into Court must be paid in before the summons for discovery is taken out; *Aitken v. Ettershank*, 205.

——— (3.) An application for discovery of documents is not a *proceeding*, and can be made although all proceedings in the action are ordered to be stayed; *Peck v. Land Mortgage Bank*, 268.

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——— (3.) Alimony—Respondent out of jurisdiction—Where the Court has jurisdiction to entertain a petition for divorce whether the respondent is resident within the jurisdiction or not, it has also jurisdiction to make any other order incident to such petition; *Splatt v. Splatt*, 218.

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——— (5.) Rules of Supreme Court 1884, Order XXXVIII., r. 10—Affidavit note—The note required by rule 10 of Order XXXVIII. to be appended to every affidavit, must be added to all affidavits filed and used in the Divorce and Matrimonial Jurisdiction of the Supreme Court; *Cameron v. Cameron*, 210.

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——— (2.) **Production of**—See PRACTICE (66); *Aitken v. Ettershank*, 221.

——— (3.) When a document containing promises to pay is to be regarded as a promissory note under sec. 51 of ACT No. 645—See STAMP DUTIES ACT 1879; *Davies v. Herbert* 197.

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——— (2.) Where the defendant owned certain land on which were houses, and there was a water-pipe passing through other land of the defendant and supplying such houses from the road, and the defendant after the sale of such houses to the plaintiff cut off such pipes so as to deprive the plaintiff of water. *Held*, that this was a reasonable easement and passed to the plaintiff; *Taylor v. Browning*, 244.

Ejectment—See LANDLORD AND TENANT (5); *Carson v. Wood*, 92.

——— (2.) See COUNTY COURT STATUTE 1869 (11); *Mason v. Ryan*, 152.

——— (3.) Adverse possession—Infence to be drawn from fence extending across boundary — Misdirection; *Hall v. Warburton*, 12.

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——— (2.) Commission to examine witnesses—Application previously refused by another judge; *Merry v. Reg.*, 23.

——— (3.) A document, signed by the person impounding and given to the poundkeeper, and which stated that certain horses had been impounded, and that certain damages for the trespass was demanded, is receivable in evidence, it having been proved that such person impounding had instructions from the defendant to impound; *Griffin v. Ross*, 258.

——— (4.) Criminal Trial—Evidence cannot be given of a statement made by a witness at a previous trial—What a prisoner says or does at a previous trial is admissible; *Reg. v. Rooney*, 100.

——— (5.) **Discovery of Fresh**—See NEW TRIAL; *Ward v. Hearne*, 49.

——— (6.) Necessary witnesses residing out of the jurisdiction—Grant of commission to examine; *Merry v. Reg.*, 14.

——— (7.) Taken by one party on commission after he and the other party have stated that they do not intend to call further evidence inadmissible on the hearing; *Bell v. Clarke*, 34.

——— (8.) Trial for murder—Threats — Misdirection — Threats used against a class are evidence against a prisoner charged with the murder of one of that class—The cast taken of tracks said to be the prisoner's, and of tracks made by the boots the prisoner was wearing at the time of his arrest are evidence—It is not a misdirection for the judge to tell the jury that they might take into consideration the fact that it was not suggested that any one except the prisoner entertained any ill-feeling to the deceased, or had any motive or inducement to commit the crime; *Reg. v. O'Brien*, 95.

——— (9.) Where wife of insolvent claims to be entitled to money in a bank in the name of the husband; *Hasker v. Summers*, 80.

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——— (2.) secs. 7, 8, 9—Prohibition—Dividing fence—Notice to contribute—Service of notice. A notice by one landowner calling upon his adjoining landowner to contribute to the construction of a dividing fence must be served on such adjoining landowner personally—What is personal service; *Reg. v. Heron, ex parte Mulder*, 143.

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13 Geo. II., c. 18, s. 5—Fiat for writ of *certiorari*—Proof on oath of six days' notice in writing necessary; *Ex parte Sayers*, 24.

21 Geo. III., c. 49—The act of 21 Geo. III., c. 49, is in force in the colony of Victoria; *M'Hugh v. Robertson*; *Benn v. Symes*, 227.

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——— (2)—See MARRIED WOMAN (1); *Re Ronayne*, 33.

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Health (Amendment) Act 1867 (No. 310), sec. 47—A local board cannot sue under sec. 47 of Act No. 310, until notice has been given of the amount due; *Local Board of Health of Ballarat East v. Carvalho*, 200.

Husband and Wife—Divorce—Commission—Suit not in issue—Commission granted to examine witnesses although the suit is not in issue, if circumstances require; *Malpas v. Malpas*, 20.

——— (2.) Gift by husband to wife within two years of the insolvency of the husband—See INSOLVENCY STATUTE 1871 (7); *Cohen v. Lintz*, 18.

——— (3.) Petition for divorce by husband against wife—Application for costs of wife *de die in diem*, and for costs of trial—Form of order; *Hayle v. Hayle*, 18.

——— (4.) Voluntary settlement—Where a husband having made a voluntary settlement of certain property on his wife, sold this property after the death of his wife, having taken out administration to her estate. *Held*, that the land so settled is part of the assets of the wife, and that the husband, as administrator, is accountable to the next-of-kin of the wife for the value of such property; *Howell v. Harding*, 246.

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——— (2.) Appointment of guardian—Maintenance ordered out of income but not out of corpus; *Re Hunt*, 84.

Informalities Amendment Act 1884 (No. 810), sec. 6—A judge, sitting as a Court has power to amend the minute of an order made by justices directing imprisonment as a means of enforcing the payment of a fine, they not having power to make such an order; *Reg v. Alley, ex parte M'Queen*, 216,

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——— (2.) See TRADE MARK (1); *Hop Bitters Manufacturing Co. v. Wharton*, 176.

——— (3.) No application lies against the Crown to prevent the issue of a licence inconsistent with the rights of a former lessee—When proceedings to be taken; *The Shire of Ballan v. Reg*, 109.

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Innkeeper and Guest—Under what circumstances lien of inn keeper over guest's property may be defeated; *Reg. v. Hinton*, 12.

Insolvency Statute 1871 (No. 379), sec. 22—Meeting of creditors—Attorney under power — An attorney under power can appear and vote at a meeting of creditors upon his sworn statement that he is duly authorised to act; the power of attorney need not be produced—Where a creditor consents to a reduction of his claim he may be allowed to be present at a meeting of creditors for a less amount than his claim—An agent of a creditor can value the security held by such creditor; *Re William Evans*, 249.

——— (2.) sec. 37 — A secured creditor who denies the fact of holding a security cannot petition for sequestration — A secured creditor who petitions for sequestration is bound to give up his security at the price he puts upon it; *Re M'Namara*, 112.

——— (3.) Sec. 37, sub-sec. (ii.) — A creditor of an insolvent cannot bring a suit to set aside a transfer of property made by the insolvent on the ground that the transfer was made with intent to defeat and delay his creditors—The official assignee is the proper person to bring the suit; *Douglas v. M'Intyre*, 90.

———(4.) Sec. 53—A creditor can raise an objection to the affidavit of another creditor at a meeting under sec. 53 of Act No. 379, at any time before the creditor signs the resolution; *Re Snell*, 61.

———(5.) Sec. 56—A judge sitting in Chambers has no power under sec. 56 to appoint a new assignee to an estate in the event of the death of the first assignee - Such application ought to be made to a judge sitting as a Court - On an application for confirmation of a certificate of discharge, notice should be given to the official assignee; *Re Sinclair*, 79.

——(6.) Secs. 58, 68 (iii.), 93—Pension—Where an insolvent is in receipt of a pension not in the nature of half-pay, but one given wholly for past services, such pension passes to the trustees, and is property within the meaning of secs. 58 and 68 (iii.) of Act No. 379; *Re Alexander Cockburn*, 248.

——— (7.) Sec. 70—Gift by husband to wife within two years of insolvency, a settlement within the meaning of the section, and void as against the trustee of the husband's estate; *Cohen v. Lintz*, 18.

——— (8.) Sec. 70—13 Eliz., c. 5—Life Assurance Companies Act 1873 (No. 474), sec. 37—Life Policy—Assignment in trust for benefit of children of assignor—Registration of assignment — Insolvency of assignor within five years—Bill by trustee of his estate to set aside assignment of life policy—Construction of sec. 37 of Act No. 474—Overplus; *Davey v. Pein*, 262.

——— (9.) Sec. 113, sub-sec. 2—Definition of the word "servant'—A commission agent is not a servant within the meaning of sec. 113, sub-sec. 2 of Act No 379, and is not entitled to prove as a preferential creditor; *In re Edwards, ex parte Tomlins*, 218.

——— (10.) Secs. 129, 131, 151—An acceptance of an offer of composition embracing all creditors by a three-fourths majority of the creditors will bind all other creditors even though dissenting; *Connell v. Carroll*, 55.

——— (11.) Secs. 135, 138 (sub-sec. 12) 146—Rules 93, 103—Application by creditor under sec. 146 of Act No. 379, requiring insolvent to appear before the Court—Such application regulated by r. 103—What statement should be made on such proceedings—Rule 93 applicable to proceedings under sec. 135; *Re Caulfield*, 58.

——— (12.) Secs. 136, 138, sub-secs. i, vii., x., xi.—Not keeping reasonable accounts — Fictitious capital, meaning of — Contracting debts without intending to pay, &c. — Unjustifiably disposing of property—Grounds for dispensing with condition; *Re Monaghan*, 1.

——— (13.) Secs. 136, 138, sub-sec. 1—Certificate—Refusal of certificate—Refusal of certificate by judge of the Court of Insolvency—Appeal to Full Court—An appeal lies to the Full Court from a decision of the judge of the Court of Insolvency refusing a certificate under sec. 136 of Act No. 379; *Re M'Intyre*, 254.

——— (14.) Sec. 154, sub-secs. (x.) and (xiii.)—Meaning of "document" within sub-sec. (x.) (*Re Walters*, 3 W. W. & A'B (1 E. & M.) 14 followed; *Re Clapham*, 15.

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——— (2.) **1864** (No. 204), sec. 19 — *Regulæ Generales*, 1st Feb., 1854, rule 15—Rules of Supreme Court 1884, Or. LXIV., r. 5*—Vacation—Signing judgment in vacation—Judgments in actions under Act N. 204 can be signed during the vacation; *Phillips v. Fitts*, 158.

——— (3.) Sec. 19, sch. 2—A writ endorsed in accordance with schedule 2 of Act No. 204, in an action brought under that statute, may be taken to be a writ specially endorsed under the Judicature Act; *Goodwin v. Heanchain*, 160.

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——— (3.) **Leave to sign final**—See PRACTICE (31); *Wainman v. Hansen*, 24.

——— (4.) **Recovered, plea of**—See PRACTICE (28); *Bank of Australasia v. Miller*, 234.

——— (5.) **Setting aside**—See PRACTICE (83); *Colonial Bank of Australasia v. M'Leod*, 14.

——— (6.) See PRACTICE (82); *Graham v. Moylan*, 115.

——— (7.) **Signing of, in vacation**—See INSTRUMENTS AND SECURITIES STATUTE 1864 (2); *Phillips v. Fitts*, 158.

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——— (2.) Sec. 20—A prisoner committed by justices to take his trial upon evidence showing a *prima facie* case against him on a particular charge can be presented against by the Attorney-General in

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the Supreme Court on a different charge—The proceedings provided for in the Justices of the Peace Statute for the committment of prisoners were designed for the purpose of securing the attendance of the person charged with the offence at the Court where he is to be tried; *Reg. v. Martin*, 163.

——— (3.) **1883** (No. 761), secs. 8 (sub-sec. 4) 64—Charging order—Recognition by a judge of an equitable claim; *Long Tunnel Gold Mining Co. v. Zimmier*, 25.

——— (4.) Sec. 13—Terms abolished for the purpose of carrying on the business of the Court, but continued for the purpose of measuring time; *Husband v. Husband*, 60.

——— (5.) Sec. 22—Rules of Supreme Court 1884, Or. LXV., r. 1—Discretion of a judge in Chambers with regard to costs; *Fahey v. Ivey* 26.

——— (6.) Secs. 36, 71—County Court practice—Counter-claim—A judge of the County Court has power under sec. 56 of Act No. 761 to entertain a counter-claim; *Griffin v. Ross*, 258.

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——— (2.) Secs. 56, 57—Rules of Supreme Court 1884, Or. XXV., r. 2—Issuing a warrant on a Sunday—A justice of the Peace has power to issue a warrant on a Sunday only in cases where the person sought to be arrested is charged with being guilty of an indictable offence—Points of law raised by the pleadings ordered to be tried before the trial of the action; *Graham v. Haig*, 158.

——— (3.) Sec. 107—Dismissal of complaint—Certificate of dismissal—Estoppel—A dismissal of a complaint, or information by Justices of the Peace followed by a certificate of such dismissal is, under sec. 107 of Act No. 267, no bar to another action for the same matter between the same parties in any other Court but a Court of Petty Sessions; *Reg. v. Cope, Ex parte Cerezo*, 255.

——— (4.) Sec. 117—See POLICE OFFENCES STATUTE 1865 (2); *Ex parte Fat Tack*, 37.

——— (5.) Secs. 117, 123 — See LICENSING ACT 1876 (5); *Reg. v. Perry*, 11.

——— (6.) Sec 150—Appeal case—The onus of proving that the appeal case was served after it was filed with the prothonotary, lies on the party moving to strike the appeal case out of the list—Appeal case not struck out where the appellants have been guilty of no undue delay, although the case was not filed within fourteen days from receiving the same from the justices; *Local Board of Health of Ballarat v. Carvalho*, 191.

——— (7.) Appeal case—Notice of appeal—The appellant did not give notice in writing to the respondent of the appeal till after the transmission of the case to the Full Court—*Held*, that the case must be struck out; *Boyle v. Reynolds*, 256.

——— (8.) **(Amendment) 1867** (No. 319), sec. 2—Affidavit—Jurat—The affidavit of personal service of a summons, required by sec. 2 of Act No. 319, should show on its face that it was both signed and sworn before the justice before whom it was made; *Reg. v. Howitt, ex parte Walker*, 150.

——— (8.) **1876** (No. 565), sec. 21—A statement taken in accordance with the provisions of sec. 21 of Act No. 565, can be read in evidence without previous medical testimony to show that the person making the statement was ill at the time such statement was taken—Such statement need not be signed *then and there* by the justice taking the same; *Reg. v. Noblett*, 274.

——— (9.) **(Prohibition) Act 1877** (No. 571), sec. 4—See TRADE MARKS STATUTE 1864 (2); *Reg. v. Alley, ex parte M'Queen*, 169.

——— (10.) Sec. 4—Pounds Act 1874 (No. 478), secs. 14, 19, 28, 29—Grounds for quashing an order of justices — When notice in writing under sec. 28 of the Pounds Act necessary—Particular nature of the illegality under secs. 14 or 19 of Pounds Act need not be set forth in order ma e under sec. 29—Words necessary to give justices jurisdiction to make an order under sec. 29 of Act—Discretion of judge under Act No. 571 to grant an order to quash or to prohibit; *Reg. v. Littleton*, 21.

——— (11.) Sec. 4 — Conviction—Where a conviction is bad on its face there is no discretion under sec. 4 of Act No. 571 to refuse an application to quash it; *Ex parte Kirk*, 217.

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——— (2.) **1869** (No. 360)—Lessee—Where a lessee of Crown lands sublets such lands contrary to the conditions of his lease, such sub-letting renders the lease merely voidable and not void, and the sub-tenant is entitled to hold the land as against trespassers; *King v. Wilkinson*, 217.

——— (3.) Secs. 21, 22—Partnership in selections—Partnership in produce; *Wisbey v. Churchman*, 82.

——— (4.) Sec. 60—See POUNDS ACT 1874 (4); *Reg. v. Carr, Ex parte Sanderson*, 53.

——— (5.) Sec. 69—See LOCAL GOVERNMENT ACT 1874 (14); *Garibald Co. v. Craven's New Chum Co.*, 93.

——— (6.) Sec. 94—SEE LOCAL GOVERNMENT ACT 1874 (17); *Rothery v. Patterson*, 92.

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——— (3.) Rent—Eviction by a landlord, in order to operate as a suspension of the rent, must amount to the expulsion or amotion of the tenant—A trespass by the lessor will be no suspension of the rent—What is eviction; *Jell v. Bradshaw*, 110.

——— (4.) Where a landlord lets a house to a tenant, and contracts with him to do certain repairs, and by reason of his breach of contract any person lawfully introduced by the tenant into the house is injured, the landlord is liable directly to the person so injured; *Hughes v. Sawyer*, 201.

——— (5.) Ejectment—Where a lease contains a covenant that the lease shall be forfeited if the tenant sub-lets the premises, and the landlord, knowing that the tenant has sub let, signs the lease. *Held*, that the signing indicated an intention on the part of the landlord to waive

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his right of forfeiture; *Carson v Wood*, 92.

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——— (2.) Sec. 50, sub-sec. (3)—Married Women's Property Act 1871 (No. 384), sec. 18 - A married woman cannot hold a licence; *Reg. v. Nicolson, ex parte Minogue*, 102.

——— (3.) Sec. 54—The convicting justices have no power under sec. 54 of the Licensing Act 1876 to award imprisonment in default of insufficient distress for payment of a fine; *Reg. v. M'Cormick, ex parte M'Monigle*, 105.

——— (4.) Secs. 54, 61—Customs and Excise Act 1862 (No. 147), sec. 143—Person holding licence under the Customs and Excise Act 1862, and selling liquor contrary to his licence, can be convicted under sec. 61 of the Licensing Act 1876; *Reg. v. Walsh*, 11.

——— (5.) Sec 77—Justices convicting under sec. 77 of Licensing Act have no power to order, in default of payment, imprisonment for a definite time; *Reg. v. Perry, ex parte Brown*, 11.

Lien—See CONVERSION; *Claxton v. Everingham*, 132.

——— (2.) See INNKEEPER AND GUEST; *Reg. v. Hinton*, 12.

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——— (2.) Sec. 37; See INSOLVENCY STATUTE 1871 (8); *Davey v. Pein*, 262.

——— (3.) Secs. 37, 38, 39 - Company—Compromise—Difference between amount of policy and of compromise—Notice of assignment — Notice of assignment of a policy followed by registration under the Act completes the title of the assignee against the insurance company at law to recover what is due on the policy; *Walpole v. The Colonial Bank*, 147.

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——— (2.) Secs. 52, 71, 73, 257 — Ouster — The occupier of a house is the person liable to be rated, and is therefore qualified to hold the office of councillor; *Reg. v. Scarlett, ex parte Lunny*, 269.

——— (3.) Secs 54, 71—Application to oust—Candidate concerned in a contract with the municipality—Disqualification—A candidate who holds a lease of certain lands from the municipality at a fixed rent is incapable of being or continuing a councillor of the municipality under sec. 54 of Act No. 506; *Reg. v. Dreverman, ex parte Watson*, 141.

——— (4.) Secs. 55, 120—Local Government Amending Act 1883 (No. 786), sec. 6 — *Mandamus* —Where at a municipal election the candidate first on the poll is disqualified the candidate next on the poll is not entitled to be declared elected unless notice of such disqualification is given before the result of the election is made known —Where there has been an election *in fact* the candidate must make the declaration within two months of such election—Where there has been an election *in fact* a candidate may be *elected* within the meaning of sec. 55 of Act No. 506 without being *declared duly elected* by the returning officer—Where there has been no election in fact, the declaration by the returning officer may be an essential preliminary before the elected candidate can make the necessary declaration; *Reg. v. M'Leod, ex parte Watson*, 181.

——— (5.) Secs. 71, 116 schedule 10 — Application under sec. 71 is not the proper proceeding where a councillor declared duly elected has not taken his seat or has not done some act which would have the effect of filling the seat—What is a sufficient signature to a nomination paper under sec. 116; *Re Cordell, ex parte Walsh*, 47.

——— (6.) Sec. 107—An election to fill an extraordinary vacancy must be held within twenty-five days of such vacancy—*In the Supreme Court* is a sufficient heading in an application to oust a councillor; *Reg. v. Joseph; ex parte Oliver*, 85.

——— (7.) Sec. 122, sch. 11—Ballot papers—Names of candidates in alphabetical order of surnames—Ouster granted on the ground that the names of the candidates at the election were not set on the ballot papers in alphabetical order; *Reg. v. Pooley, ex parte Scarlett*, 160.

——— (8.) Secs. 158, 221—Municipal council—Passing and confirming regulation—Meaning of the words *not sooner than*—Four clear weeks must elapse before the passing of a regulation and its confirmation; *Re The Local Government Act* 1874; *ex parte Taylor*, 170.

——— (9.) Secs. 169 (iii.), 260—A person who seeks to enforce a claim founded upon an alleged contract with a municipality, must prove that a valid contract, based on good consideration, has been made with him by the council; that such contract is for a purpose authorised by the Act, and that it has been made in the form or mode prescribed by the Act, as an essential condition of contracts by which the ratepayers shall be bound—The insertion in the estimate required by sec. 260 of a sum alleged to be required for a purpose not lawful, as not being some one of the purposes sanctioned by the Act, would not bind the municipality, and would not justify the payment of the sum by the council out of the municipal fund; *London v. Shire of Wodonga*, 271.

——— (10.) Sec 213 (sub-secs. 8, 17), 218—Act No. 786—Quashing bye-law—Carrying nightsoil through borough during certain hours prohibited—Such bye-law is not *ultra vires*—Such bye-law may be regarded as one made for the purpose of regulating a particular kind of traffic; *Re The Shire of Boroondara, ex parte Wadick*, 209.

——— (11.) Sec. 213, sub-sec. xvii—Polices Offences (Amendment 1878), sec. 2 - Power of municipal corporations to make bye-laws under sub-sec. xvii., forbidding all processions other than funerals to parade or pass through the streets unless with the written consent of the mayor or town clerk—*Per* Higinbotham, J.: "Questions as to the validity of bye-laws made by municipal corporations should not be entertained by justices who are called on to enforce those bye-laws; *Rider v. Phillips*, 37.

——— (12.) Sec. 253 Rates - A person occupying a portion of a building which is not a rateable property is not liable to pay rates; *The President of the Shire of Warrnambool v. Raw*, 164.

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——— (13.) Secs. 295, 296, 299, 301 – Transfer of Land Statute 1866 (No. 301), sec. 42 – Ejectment – Unpaid rates – Lease by municipal corporation – Notice – The notice required by sec. 296 of Act No. 506 must be posted before a municipal council can take possession of land for the non-payment of rates – Sec. 301 of Act No. 506 only requires that the notice of intention to lease should be posted on some conspicuous part of the land taken possession of; it is not necessary where only a portion of the land taken possession of is leased, that the notice should have been been placed on the portion so leased —The provisions in sec 301 as to posting notices after taking possession are not a condition to the validity of the lease, and do not affect the title of the lessee – Object of sec. 301—Sec. 295 of Act No. 506 passes all the land taken possession of to the municipal council, whether such land be under the Transfer of Land Statute or not – A municipal council cannot give a lease under the Transfer of Land Statute as it is not the registered proprietor under that Act, and consequently sec. 42 of that Act does not apply; *Kirkham v. Jul en*, 253.

——— (14.) Sec. 370 – Land Act 1869 (No. 360), sec. 69 – Mining Statute 1865 (No. 291), sec. 16 – Property in the soil in a public street, road, or highway cannot be created by virtue merely of a grant by the Crown of land adjoining such street; *The Garibaldi Co. v. The Craven's New Chum Co.*, 93.

——— (15.) Sec. 377—If a municipal corporation elect to do an act which they are permitted to do, the performance of which is not imperative, it must do the act in such a way as will not interfere with or injure private rights; *King v. The Mayor, &c., of Kew*, 54.

——— (16.) Secs. 377, 405, 408, 409, 410, 413—Cutting down street which had been previously levelled—A municipal council has power to raise or lower the soil of any street, but before it does so it must fix the level of every such street, and it must fix the level in such a way as to enable persons, who might fear or who might experience injury from the act of the council, to appeal—Meaning of words *level* and *paved* in sec. 408; *Kilpatrick v. Mayor, &c., of Prahran*, 272.

——— (17.) Sec. 386 Land Act 1869 (No. 360), sec. 94—Sec. 386 of Act No. 506 does not empower municipal councils to authorise persons to enter upon any Crown land, for the purpose of removing stones, &c., but only from lands specially reserved for that purpose; *Rothery v. Patterson*, 92.

——— (18) Sec. 399—*Mandamus*—Closed surveyed roads—A shire council cannot allow a landowner to close a proclaimed surveyed road passing between or through portions of his property, which by Act No. 506 is to be deemed to be required for public traffic, until the council and the Minister have otherwise decided, and such decision has been published in the *Government Gazette*. The fact that the applicant for a writ of *mandamus* has another legal remedy is no objection where the other legal remedy is doubtful, or where it is inadequate, or where the matter of which performance is sought does not admit of the delay generally attendant on legal proceedings, or where the enforcement or attempted enforcement of the other legal remedy might entail disastrous or inconvenient consequences—Wherever an Act of Parliament gives power to, or imposes an obligation on, a particular person to do some particular act or duty, and provides no specific legal remedy on non-performances, the Court will, in order to prevent a failure of justice, grant, *ex debito justitiæ*, a *mandamus* to command the doing of such act or duty; *Re Glenelg Shire, ex parte Sealey*, 179.

Lunacy of Administratrix—See PRACTICE (Probate) (13); *In the Estate of Boyd*, 182.

Maintenance—See INFANT (2); *Re Hunt*, 84.

——— **Allowance of**—See DAMAGES (1); *Norton v. Williamson*, 128.

Malice, Evidence of—See SLANDER OF TITLE.

Malicious Prosecution—In an action for malicious prosecution the plaintiff has to show that the defendant had no reasonable or probable cause for prosecuting the plaintiff; *Bauld v. Williams*, 223.

Mandamus—See LICENSING ACT 1876 (1); *Ex parte Slack*, 23.

——— (2.) See PRACTICE (16); *Reg. v. Bailes*, 29.

——— (3.) See TRANSFER OF LAND STATUTE 1866 (6); *Re O'Connell*, 85.

——— (4.) **when the Court will grant**; See LOCAL GOVERNMENT ACT 1874 (18); *Re Glenelg Shire, ex parte Sealey*, 179.

Marriage, Presumption of, See PRACTICE (Probate) (6); *Re Crane*, 203.

Marriage and Matrimonial Causes Statute 1865, (No. 268) – Agreement between husband and wife to separate—Recitals in deed disputed by petitioner — Desertion—There can be no desertion by a husband if the wife is a consenting party to their living apart from one another—But the wife's refusal to live with the husband unless he abandoned an adulterous connection is no evidence of such consent; *Jones v. Jones*, 182.

——— (2.) Sec. 62—Dissolution of marriage — Adultery of husband proved – Fearless attitude of wife towards husband – Cruelty insufficient to entitle wife to a divorce; *French v. French*, 210.

——— (3.) **Amendment Act 1883** (No. 787), Secs. 15, 16 – *Reg. Gen.*, 18th Sept., 1861, rules 18, 21, 26 – Application to have divorce suit set down for trial before a judge unnecessary; *Cameron v. Cameron*, 26.

Married Woman, Separate Estate of; See PRACTICE (Probate).

Married Woman – Guardian – Illegitimate child – A married woman cannot be appointed guardian of an infant – Costs; *Re Ronayne*, 33.

——— (2.) A married woman cannot hold a licence under the Licensing Act 1876; *Reg. v. Nicolson, ex parte Minogue*, 102.

——— (3.) Inability to satisfy distress—Issue of warrant—The issue of a warrant by justices to enforce the payment of a fine for sly grog selling or in default, imprisonment is not a civil but a criminal proceeding—If a married woman has no goods whereby a distress can be satisfied the alternative of imprisonment under the warrant may be enforced; *Ex parte M'Lellan*, 259.

Married Women's Property Act (No. 384), Sec. 18—Bill of exchange - Action by holder against acceptor, a married woman – Plea of coverture – Meaning of sec. 18 of Act No. 384; *Rennison v. Keighran*, 51.

——— (2.) Sec. 18 – See LICENSING ACT 1876 (2); *Reg. v. Nicolson, ex parte Minogue*, 102.

Master and Servant – Misconduct of servant engaged by the month during the currency of a month – Dismissal - Wages – A servant engaged by the month who is guilty of misconduct during the currency of a month which warrants his dismissal is not entitled to wages for the expired portion of the month; *Ex parte Moss*, 255.

Merger, Doctrine of, when it Applies – See PRACTICE (55); *Skinner v. M'Kenzie*, 165.

Mining Companies' Act 1871 (No 409), Sec. 38—Minute book of committee not a "book of account;" *Thompson v. James*, 12.

——— (2.) Secs. 50, 52, 54 55—Absolute forfeiture of shares—Calls—Upon absolute forfeiture of a share under sec. 54 of Act No. 409, the person to whom the forfeited share belonged is relieved from liability to be sued for the call, the non-

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payment of which had occasioned the forfeiture, and he is exonerated further from liability to pay any calls subsequently made by the company—Under sec. 52 the manager alone can sue for the amount of a call within the fourteen days, and if that time is allowed to elapse neither the manager nor the company can afterwards sue the person who owned the forfeited share, either for the first or for any subsequent call upon it; *King's Birthday Co. (Registered) v. Jack*, 275.

Mining Statute 1865 (No. 291), sec. 16—See LOCAL GOVERNMENT ACT 1874 (14); *Garibaldi Co. v. Craven's New Chum Co.*, 93.

——— (2.) Sec. 101, sub-sec. (vi.)—Contract within meaning of section—Jurisdiction of warden—Prohibition; *Reg. v. Philps*, 13.

——— (3.) Sec. 212—Mining Statute (Amendment) 1872 (No. 446), sec. 18—Time for notice of appeal and deposit may be enlarged by verbal consent; *Conway v. Louchard*, 120.

——— (4.) Secs. 230, 244—Dissolution of partnership—Judge not taking accounts between the parties or taxing costs at proper time—Appeal, not *certiorari*, proper remedy; *Reg. v. Quinlan, ex parte Sampson*, 8.

——— (5.) **Amendment 1872** (No. 446) sec. 18—See MINING STATUTE 1865 (3).

Minute Book—See MINING COMPANIES ACT 1871 (1).

Misdirection—See EVIDENCE (8); *Reg. v. O'Brien*, 95.

Misrepresentation—See SALE OF LAND (1); *O'Shanassy v. Littlewood*, 11.

Mortgage—A legal mortgage of a personal chattel may be made without a deed; *Johnson v. Union Fire Insurance Company of New Zealand*, 50.

——— (2.) A mortgagor's insolvency and the subsequent release of her estate from insolvency does not prevent the mortgagee from claiming the amount due to him on his security; *Hodgson v. Young*, 117.

——— (3.) **Assignment by Way of**—See ASSIGNMENT (2); *Pruntz v. Anthoness*, 194.

——— (4.) **Primary Object of**—See STAMP DUTIES ACT 1879—*Davies v. Herbert*, 197.

——— (5.) A mortgage under the Transfer of Land Statute, though subsequently discharged, is not sufficient proof of the exact amount alleged to have been paid as the consideration of the mortgage; *Hayes v. Wilson*, 249,

Muniments of Title, Production of—See PRACTICE (66); *Aitken v. Ettershank*, 221.

Navigation of River—See RIVER; *Fergusson v. U.S.N. Co.*, 120.

Negligence—Burden of proof—Contributory negligence—Withdrawal of case from jury—In actions for negligence the burden rests upon the plaintiff of proving affirmatively that the negligent act or omission for which the defendant is sought to be made liable, has been the *causa causans* or efficient cause of the plaintiff's injury—The question of contributory negligence is a question of fact for the jury, and a judge is not justified in withdrawing the plaintiff's case from the jury upon this ground unless where there has been no evidence at all given, except what necessarily goes to show that the negligence of the plaintiff himself has been the efficient cause of his injury; *M'Kinnon v. Morris*, 256.

New Assignment—See PRACTICE (48); *M'Kenzie v. Hanham*, 153.

New Trial—Conditions under which the Court will grant a new trial on the ground of discovery of fresh evidence; *Ward v. Hearne*, 49.

Not Sooner Than, Meaning of—See LOCAL GOVERNMENT ACT 1874; *Re Local Government Act 1874 (8), ex parte Taylor*, 170.

Notice of Trial—See PRACTICE; *Smith v. Musgrove*, 178.

Nuisance—Plea on equitable grounds of acquiescence—Demurrer—Proof of acquiescence—Costs; *Cooper v. Dangerfield*, 8.

Obstruction—See RIVER; *Fergusson v. U.S.N. Co.*, 120.

Obtaining Money Under False Pretences—Unregistered person inducing others to bet with him by wearing badge of registered bookmaker—Admission of evidence; *Reg. v. Robinson*, 14.

Official Assignee, Notice to—See INSOLVENCY STATUTE 1871 (5); *Re Sinclair*, 79.

Order, Amendment of, Minute of—See INFORMALITIES AMENDMENT ACT 1884; *Reg. v. Alley, ex parte M'Queen*, 216.

——— **Minute of**—See IMPRISONMENT FOR DEBT ACT 1865; *Reg. v. Hardware, ex parte Smith*, 151.

Order Nisi, Issue of—See PRACTICE (82); *Graham v. Moylan*, 115.

Ouster—See LOCAL GOVERNMENT ACT 1874 (3); *Reg. v. Dreverman, ex parte Watson*, 141.

Particulars, Time for Applying for—See PRACTICE (45); *Taylor v. Port*, 155.

Particulars—See PRACTICE (42); *Vail v. Gilmour*, 168.

Partnership in Selections and in Produce—*Wisbey v. Churchman*, 82.

Party and Party, Taxation as Between—See REVIEW OF TAXATION (1); *Re Barrett*, 177.

Party made Plaintiff without His Consent—The name of a plaintiff having been inserted in a writ of summons without his authority, his name was ordered to be struck out with costs, as between solicitor and client, to be paid by the solicitor inserting it—Such solicitor likewise ordered to pay the costs of the defendant; *Lane v. Henshaw*, 268.

Patent, Infringement of—The question whether there has been an infringement of a patent or not is a question of fact peculiarly for the consideration of the jury; *Samwells v. Hackett*, 185.

Pawnbrokers' Statute 1865 (No. 248), sec. 21—Pledge ticket—Signature—A pledge ticket containing the name of the pawnbroker in print is sufficiently signed under Act No. 248—Unless a statute require that a signature should be made in a particular way a mark is sufficient; *Reg. v. Moore, ex parte Myers*, 151.

Penalty, Enforcement of—Where a statute authorising the infliction of a penalty is silent as to the mode of enforcement of the penalty distress must precede imprisonment; *Reg. v. Shillinglaw, ex parte Chine*, 161.

Pension—See INSOLVENCY STATUTE 1871 (6); *Re Alexander Cockburn*, 248.

Petition—See DIVORCE (4); *Belcher v. Belcher*, 21.

Pharmacy Act 1876—(No. 558), secs. 13, 14, 15, 25—*Mandamus*—The Pharmaceutical Board of Victoria have no power to erase the name of a registered pharmaceutical chemist from the register for not intimating his change of residence to such Board in accordance with sec. 14 of Act No. 558; *Re Nettleton*, 251.

Pleading—See PRACTICE.

——— (2.) A party cannot join issue and plead matters which would be comprised in the joinder of issue; *Hearty v. Gillespie*, 265.

Pledge—See CONVERSION; *Claxton v. Everingham*, 132.

Pledge Ticket, Signature of—See PAWNBROKERS' STATUTE 1865; *Reg. v. Moore, ex parte Myers*, 151.

Poisons Act 1876 (No. 559), Sec. 3—Unauthorised sale of poison—Conviction—Form of conviction—Where a statute authorising the infliction of a penalty is silent

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as to the mode of enforcement of the penalty distress must precede imprisonment — Costs; *Reg. v. Shillinglaw, ex parte Chine*, 161.

Police Inspector, Costs of —See LICENSING ACT 1876 (1); *Ex parte Slack*, 23.

Police Offences Statute 1865 (No. 265), Sec. 17 (vi.)—Trespass—A trespass for which a fine could be imposed under Act No. 265 must be a personal one; *Reg. v. Garside, ex parte Briggs*, 152.

——— (2.) Secs. 43, 63—Justices of the Peace Statute 1865 (No.), sec 117—Police Offences Statute Amendment 1872 (No. 532), sec. 4—Where a party is convicted under sec. 43 of Act No. 265, the convicting justices may adjudge immediate imprisonment upon default of immediate payment, without intervening distress under sec. 63 of the same Act—Where a statute authorising the infliction of a penalty either directs a levy by distress or is silent as to the mode of levying for the penalty, distress must precede imprisonment—Power of justices to award costs under sec. 63 of Act No. 265; *Ex parte Fat Tack*, 37

———(3.) **Amendment 1872** (No.), Sec. 4 — See POLICE OFFENCES STATUTE 1865 (No.); *Ex parte Fat Tack*, 37.

——— (4.) **Amendment Act 1876** (No. 532), Sec 1—Gaming at any game or *pretended* game of chance—Meaning of the word *pretended*; *M'Laughlin v. Call*, 243.

Pounds Act 1874 (No. 478), Secs. 14, 19, 28, 29—See JUSTICES OF THE PEACE (Prohibition) 1877 (10); *Reg. v. Littleton*, 21.

——— (2.) Sec 14—The words "within five miles of the place trespassed upon," means the place where the sheep were depasturing at the time they were seized—A poundkeeper is not the servant of the person impounding, but of the municipality; *Sanderson v. Fotheringham*, 122.

——— (3.) Secs. 14, 15—Fences Statute 1874 (No. 479), sec. 4—Substantial fence—Sufficient fence—Trespass fees—The owner of cattle found trespassing on enclosed land is liable to pay trespass fees to the occupier of such land if enclosed with a *substantial fence*—Such fence need not be a *sufficient fence* under the Fences Statute 1874; *Reg. v. Hutchinson ex parte Jessell*, 161.

——— (4.) Sec. 15—Land Act 1869 (No. 360), sec. 60—The managers of a common cannot sue for trespass rates under sec. 15 of Act No. 478, not being *occupiers* within the meaning of that section; *Reg. v. Carr, ex parte Sanderson*, 53.

Practice — After commencement of action new procedure ordered to be adopted on affidavit of counter-claim; *Langton v. Gillespie*, 20.

——— (2.) Appeal against chief clerk's decision—Taking accounts in suit — Discretionary power of chief clerk—It rests entirely with the chief clerk to direct what parties shall bring in accounts; *Bell v. Clarke*, 127.

——— (3.) Common Law Procedure Statute 1865 (No. 274), sec. 22—Change of venue — Convenience — Where an application is made after a trial in which the jury have disagreed to change the venue of the second trial, very strong grounds for the desirability of the change should be shown—If there are reasons making it undesirable that the second trial should be held in the same place as the previous one those reasons should be stated; *Paterson v. Luke*, 140.

——— (4.) Sec. 88—Expiration of writ—Renewal—A judge has no power to order the renewal of a writ after it has expired; *Hepburn v. Dawbin*, 129.

——— (5.) Sec. 211—Foreign attachment—Where a writ is addressed to the garnishee under a wrong name a judge will not allow the writ to be amended, the application must be commenced *de novo*; *Bailey v. Barclay*, 66.

——— (6.) Sec. 252—*Mandamus*—Discretion of Court in the matter of costs—Party unsuccessfully resisting the issue of a *mandamus* relying upon the decision of the Court to which the *mandamus* is directed, is not thereby exempt from costs—Body exercising quasi-judicial functions not to be fixed with costs unless guilty of improper conduct; *Reg. v. Bailes*, 29.

——— (7.) Secs. 388, 392—Taxation of bill of costs—A bill of costs will be ordered to be delivered under the Act only in cases where a bill if delivered could be referred to taxation—Where a bill has been paid and more than a year has afterwards elapsed it cannot be ordered for taxation; *Re Chambers, ex parte Speed*, 125.

——— (8.) Sec. 420—Judicature Act 1883 (No. 761), secs. 36, 41—Rules of Supreme Court 1884, Order XXXVIII., rule 10—Order LIV., rules 4*, 10—Order LXIV., rule 11—Order LXVI., rule 7 (*m.*) Order LXX., rule 1—Power given to Rules of Supreme Court by secs. 36 and 41 of Act No. 761—Sec. 420 of Act No. 274 repealed by Order LIV., rule 4*—Affidavit must show on whose behalf it was filed—Summons not required to be signed by a judge or in a judge's name; *Rudduck v. Clarke*, 46.

——— (9.) County Court Statute 1869 (No. 345), sec. 120—Appeal—Re-hearing—When a case on appeal from the County Court is ordered to be re-heard, such re-hearing shall be taken before a judge of the Supreme Court without a jury—The re-hearing of a County Court action before a judge of the Supreme Court does not make it a Supreme Court action so as either to enlarge the jurisdiction as to amount or to effect the question of costs—The plaintiff is to set the cause down for re-hearing, and give notice of trial—*Eddington and Carisbrook Estate Company, No Liability v. Ochiltree* (6 A. L. T., p. 189) confirmed; *O'Hara v. Rochford*, 219.

——— (10.) Declaration inconsistent with evidence—Amendment—Costs of witnesses; *Atkinson v. Dehnert*, 10.

——— (11.) Decree—After a decree has been passed and entered there is no power to alter it by motion; *Cohen v. Lintz*, 63.

——— (12.) Instruments and Securities Statute 1864 (No. 204), sec. 19—Rules of Supreme Court 1884, Order IX., rule 6—Order XVI., rules 4, 6, 14—Action on cheque drawn by partnership firm—Service of writ; *Oriental Bank v. Halstead*, 30.

——— (13.) Interrogatory—When a party objects to answer an interrogatory on the ground that it may tend to criminate him, he must do so on oath; *Paterson v. Luke*, 86.

——— (14.) Interrogatories—Where in an action for libel interrogatories are delivered by the plaintiff as to the publication, &c., the defendant cannot insert in his answering affidavit matters which are intended as a justification for his conduct; *Roper v. Williams*, 87.

——— (15.) Nature of interrogatories—On an application for leave to deliver interrogatories, the nature of the proposed interrogatories should be stated—Where the pleadings are produced a statement from counsel of the nature of the proposed interrogatories will be sufficient; *Holt v. Henry*, 98.

——— (16.) Judicature Act 1883 (No. 761), secs. 2, 13, 22—Supreme Court (Constitution) 1852 (No. 10), sec. 19—Sec. 19 of Act No. 10 repealed by sec. 2 of Act No. 761—Terms abolished — Jurisdiction and powers of a judge sitting in Court and in Chambers; *Reg. v. Bailes*, 29.

——— (17.) Sec. 8, sub-sec. 5—Rules of Supreme Court 1884, Order LXV., r. 27, sub-sec. 12—Action under old procedure—Cross-action under new procedure—Cross-action stayed and liberty given to set up equitable facts by way of counter-claim—Costs occasioned by cross-action—Allowance to solicitor; *Ettershank v. Russell*, 19.

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——— (18.) Sec. 9, sub-sec. 8 — Rules of Supreme Court 1884, order L., r. 6—Order LIV., r. 1—Equitable execution—Appointment of a receiver—Application for the appointment of a receiver may be made on summons to a judge in Chambers—Before granting equitable execution the Court or a judge must be satisfied that the plaintiff has tried all he could to get satisfaction at law within the colony; *Ettershank v. Russell*, 140.

——— (19.) Sec. 9, sub-sec. 11—Action for negligence under old procedure—Report of medical men—Privilege—Costs; *Bradshaw v. Victorian Railway Commissioners*, 20.

——— (20.) Secs. 10, 19—Rules of Supreme Court 1884, Order LXIII. r. 2*—Caveat—A judge in Chambers has power to hear applications to delay dealings with land under the Transfer of Land Statute 1866; *Re The Transfer of Land Statute ex parte Peck*, 162.

——— (21.) Sec. 22—Rules of Supreme Court 1884, Order XXXVI., r. 6—On an application to have an action tried with a jury a judge will not require an affidavit as to the nature of the action if the pleadings are produced — If the pleadings are not produced an affidavit is necessary—Power of a judge in Chambers to deal with the costs of an application under sec. 22 of Act No. 761—*Coulson v. Campbell*, 89.

——— (22.) Sec. 41 Rules of Supreme Court 1884, Order XVI., r. 40—Service of notice of a decree upon interested persons residing out of the jurisdiction; *Hayes v. Wilson*, 87.

——— (23.) Sec. 59—Rules of Supreme Court 1884, Appen. A., Part I., No. 5—Writ for service out of the jurisdiction; *Priestly v. Davis*, 18.

——— (24.) Sec. 59—Foreign procedure—Where the agreement was made and the breach occurred out of the jurisdiction, the plaintiff, to entitle him to proceed in Victoria, has to satisfy the judge that some substantial part of the action arose in Victoria; *Cussen v. Macpherson*, 205.

——— (25.) Rules of Supreme Court 1884, Order III., r. 6—Order XIV., r. 1—Writ specially indorsed—Signing final judgment—Order III., rule 6 (F.), only applies to cases in which the relation of landlord and tenant exists between the parties; *Davies v. Herbert*, 70.

——— (26.) Order III., r. 6—Appendix C., sec. IV.—Specially endorsed writ — Cheque — Where a writ is intended to be specially indorsed in an action by the holder of a cheque against the drawer, the endorsement should contain an affirmation that the cheque was presented for payment and was dishonored; *Nathan v. Turnbull*, 139.

——— (27.) Order XIV., r. 1—Scale of costs—Such costs as fixed include costs of the judgment, but not those of counsel; *M'Lean v. Knipe*, 166.

——— (28.) Order XIV., rule 1—Joint promissory note—Judgment recovered—One of the parties jointly liable—Judgment vacated without the leave of the Court or a judge — Where a judgment was obtained against one of the parties liable on a joint promissory note, and such judgment was vacated without the leave of the Court or a judge, the other party jointly liable should not be deprived of the opportunity of pleading judgment recovered by having final judgment entered against him under Order XIV., r. 1; *Bank of Australasia v. Miller*, 234.

——— (29.) Order XIV., rule 1—Rule 1 of Order XIV. only applies to cases where a writ is specially endorsed, and a judge has no power to make an order under that rule unless the writ is a specially endorsed one; *Tooth v. Nathan*, 267.

——— (30.) Order XIV., rule 1—Appendix A., Part 1, No. 2—A specially endorsed writ should be headed *Statement of Claim*, and should be signed; *M'Vean v. Miller*, 268.

——— (31.) Order XIV., rules 1, 3 — Circumstances under which a plaintiff will be allowed to sign final judgment—Onus of proving that he is entitled to defend lies on defendant—What proof will be sufficient—Power of a judge under Order XIV., rule 3, exercised only in exceptional cases; *Wainman v. Hansen*, 24.

——— (32.) Order XIV., rules 1, 4 — Where an application is made to sign final judgment on the ground that there is no defence to the action, the plaintiff has to show that the money is owed legally—If the defendant does not appear on such application the plaintiff has to show that there is no defence—Liberty given to plaintiff on such application to sign judgment for a portion of the claim which is not in dispute; *Traders' Company Limited and Brown v. Sutton*, 113.

——— (33.) Order XVI., rule 2—Substitution of plaintiff—Costs; *Bank of Victoria v. M'Lay*, 27.

——— (34.) Order XVI., rule 48, does not apply to a case in which there can be no contribution or indemnity between the defendant and the party sought to be brought in as third party, or where such party is resident out of the jurisdiction of the Court—Refusal of a judge to grant an application to bring in a third party on the ground of simplicity; *Round v. Victorian Stevedoring and General Contracting Company Limited*, 88.

——— (35.) Order XVI., rule 48 — Indemnity — Applications under Order XVI., rule 48 must be limited to cases coming strictly within the words of the rule; *Heselton v. Crozier*, 206.

——— (36.) Order XVIII., rules 8, 9 Joinder of causes of action—Discretion of judge—Joinder of action of *devastavit* with action for *goods sold and delivered* or for *money received*, allowed; *M'Auley v. Beatty*, 266.

——— (37.) Order XIX., rule 4—Appendix C., sec. 7, No. 2—Rules of Supreme Court, August, 1884, rules 6 (sub-sec. A) 7—Statement of claim not in accordance with rules—Action for recovery of land—Costs; *Ruddock v. Clarke*, 45.

——— (38.) Order XIX., rules 4, 5, 6, 7. Appendix C., sec. VI, No. 14 — Fraudulent representation—Statement of claim—Particulars—Pleading; *Desailly v. Ham*, 21.

——— (39.) Order XIX., rules 4, 5, 7, 19, 27 — Appendix D., sec. VI.—In an action for wrongs the denial by the defendants of all the *material allegations* in the statement of claim is not sufficient—A statement in the defence that the alleged injuries were occasioned by a certain instrument, and that the defendant had not the care and management of, or any property in, such instrument is not only an allowable but a very proper defence to put on the record; *Blackburn v. The Mayor, etc., of Melbourne*, 154

——— (40.) Order XIX., rules 6, 27—Striking out pleading—Reply to counter-claim embarrassing — Delivery of particulars—Breach of agreement to carry goods on certain terms and conditions—Counter-claim for price of carriage — Reply that conditions of carriage unfulfilled. *Held*, that such reply is good; *The Squatting and Investment Co., Limited v. Permewan*, 207.

——— (41.) Order XIX., rules 4, 11 — Order LXX., rule 1 — Statement of claim — Dates and sums to be in figures, to be signed, and to state the particulars of damage; *Vail v. Gilmour*, 64.

——— (42.) Order XIX., rule 6 — Appendix C., sec. VI., Nos. 13, 14 — Particulars — Striking out an amendment of reply—Misrepresentation and fraud alleged—Rule 6 of Order XIX. is imperative as to the insertion of particulars when fraud and misrepresentation are alleged; *Vail v. Gilmour*, 168.

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——— (43.) Order XIX., rules 6, 7 — Statement of claim — Set-off and counterclaim — Particulars A judge in Chambers has no power to fix the amount of the costs of an application without the consent of both sides; *Freehold Investment and Banking Co. of Australia, Limited v. Thompson*, 65.

——— (44.) Order XIX., Rule 7 — Particulars — Application for particulars ought to be made before the party applying has pleaded — Application for particulars after the party applying has pleaded will not be granted unless under special circumstances; *Taylor v. Port*, 155.

——— (45.) Order XIX., rules 7, 13, 15 — Particulars — Libel — Plea of non-admission—Effect of such plea—Plea of justification; *Hedrick v. Purse*, 222.

(46.) Order XIX., rules 13, 17—Appendix D., sec. VI., No. 1 — Action for slander — Denial of *the several facts and matters complained of* struck out as embarrassing—Each party must, either by a traverse or by an answer in the nature of a plea of confession and avoidance, or by an express withholding of admission, deal with every allegation, material or immaterial, in his adversary's previous pleading, which he does not intend should be admitted by him—The form given in Appendix D., sec. VI., No. 1, is a mere direction, and is not, and does not purport to be, a general form of denial to all actions for wrongs; *Hasse v. Eicke*, 190.

——— (47.) Order XIX., rules 13, 17, 19 — Pleading — The defendants to certain paragraphs of the statement of claims, pleaded that *they deny each of the allegations*, &c.; and to others that *they do not admit any of the allegations*, &c. *Held*, that such pleas were well pleaded; *Virtue v. Young*, 204.

——— (48.) Order XIX., rule 27 — Order XXIII., rule 6 — New assignment — Pleading embarrassing—Reply ordered to be struck out or amended on the grounds that it raises a *new assignment*, that it contains inconsistent statements, that the points of law intended to be raised by it are not clearly raised; *M'Kenzie v. Hanham*, 153.

——— (49.) Order XIX., rule 27—Order XXV., rule 4 — Forms by which the object of demurrers may be obtained—The proper ground for striking out a pleading as embarrassing is that the pleading will embarrass the fair trial of the action; *Laffy v. Dougharty*, 236.

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——— (65.) Order XXXI., rules 12, 26 — Discovery of documents —The £5 required by rule 26 to be paid into Court, must be paid in before the summons for discovery is taken out; *Aitken v. Ettershank*, 205.

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——— (26.) *Regulæ Generales*, 23rd June, 1873, rule 5—Administration—Where an application for administration is made by the mother of the intestate, the affidavit should state that the intestate has left no wife or children; *In the Estate of Lewis*, 143.

——— (27.) *Regulæ Generales*, 23rd June, 1873, rule 5—Administration—The character in which the applicant claims to be entitled to administration must be set forth in the affidavit—Affidavit stating that the applicant applied "as the eldest brother" of the intestate, is not sufficient—The affidavit should state that the applicant "was" the the eldest brother, and claimed as such; *In the Estate of Rosenthal*, 143.

——— (28.) *Regulæ Generales*, 23rd June, 1873, rule 6—Application for administration by creditor—The Administration Act 1872 (No. 427), sec. 36, applies only to a resisting executor—Summons issued by master calling upon executrix "within" fourteen days to show cause, &c., informal—Caveat lodged by next-of-kin who does not apply for administration to himself or oppose the application on the ground of his having a better right to administration than a creditor; *Re Spinks*, 36.

——— (29.) *Regulæ Generales*, 23rd June, 1873, rule 6—Administration to creditor—Advertisement of order directed to next-of-kin, to show cause within 14 days held sufficient—*In re Spinks* followed; *In re James Quish*, 171.

——— (30.) Supreme Court (Constitution) Act 1852 (No. 10), sec. 16—Application by executors for leave to pass their accounts, and for commission—The Court will not grant such an application where only three months have elapsed since the grant of probate; *In the Will of Allison*, 143.

——— (31.) Trustees, Executors, and Agency Act 1879 (No. 644), sections 1, 2—Administration *de bonis non cum testamento annexo*—Where a person who would be entitled to take out administration, resides within the jurisdiction of the Court, he cannot, by his consent, substitute the Trustees, Executors, and Agency Company, or any other person for himself; *In the Will of Payne*, 116.

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——— (38.) Will — Executors — Commission — The first duty of executors is to realise the estate, and not to continue a business—The Court will not make an order for commission where the executors have gone beyond the simple performance of their duties; *In the Will of Sinnett*, 225.

——— (39.) Will — Construction—Child — Trustees — Carrying on testator's business — Omitting to file accounts within 15 months—Costs—Mining shares—Calls and dividends; *Knight v. Knight*, 62.

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——— (42.) Will—Construction—Where a will directs that the income of certain property should be paid jointly to two persons, and in the case of the death of one, to the survivor. *Held*, that such persons were entitled to only a life interest of the property jointly, and on the death of either the whole income would go to the survivor; *Pirie v. Smith*, 227.

——— (43.) Will—Construction—A testator directed his trustees to pay to his widow an annuity of £4000 till his youngest child attained the age of 21 years, and when that event happened, the widow was to be paid a sum of £6000, and the annuity was to be reduced to £2000—Each of his daughters was to receive £12,000, and his son was left the residuary legatee. *Held*, that the trustees might set apart sums of £12,000 to meet the legacies, and, if they elected so to do, that they might withdraw them for the purpose of paying the annuity; that they could not pay the legacies till the youngest child had attained the age of 21 years; and that the annuities to the widow were payable in priority to the legacies to the daughters. *Held* also, that the gift to the son of the residuary estate postponed him to both the payment of the annuities and the legacies; *Robertson v. Corbett*, 226.

——— (44.) Will—Executor according to the tenor—Word *trustee* used instead of *executor*; *In the Will of Chellew*, 17.

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——— (52.) Will—Where the testator appoints executors and his widow executrix, so long as she remains his widow, probate will be granted to the widow, with leave reserved to the executors; *In the Will of Dawson*, 84.

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Slander of Title—Caveat lodged against the issue of a lease on a fictitious claim on behalf of Her Majesty—Evidence of malice; *Matthews v. Morrah*, 9.

Solicitor, Attendance at the Trial of Country Solicitor, as well as Town Agent—See REVIEW OF TAXATION (1); *Re Barrett*, 177.

Solicitor and Client, Taxation as Between—See REVIEW OF TAXATION (1); *Re Barrett*, 177.

Stamp Duties Act 1879 (No. 645), sec. 51—A mortgage over land is not a promissory note within the meaning of sec. 51 of Act No. 645—An act imposing duties is to receive a strict and not a liberal interpretation so far as the imposition of the duty is concerned—A document containing promises to pay is to be regarded as a promissory note under sec. 51 of Act No. 645 only (1.) where the promise to pay is a promise to pay a fixed and definite sum of money; (2.) where the primary purpose of the document containing the promise is the promise to pay such sum—The primary object of a mortgage is the conveyance of land to secure the repayment of a sum of money, and it does not promise to pay a fixed or definite sum of money, but merely to pay so much as shall for the time being remain unpaid; *Davies v. Herbert*, 197.

Statute—An act imposing duties is to receive a strict and not a liberal interpretation, so far as the imposition of the duty is concerned; *Davies v. Herbert*, 197.

Statute of Trusts 1864—(No. 234), sections 56, 57—See PRACTICE (84); *Re Stanton*, 33.

Street, formation of private — See PUBLIC HEALTH (AMENDMENT) STATUTE 1883; *Reg. v. Alley, ex parte Clauscen*, 150.

Street, Cutting Down—See LOCAL GOVERNMENT ACT 1874 (16); *Kilpatrick v. Mayor, &c., of Prahran*, 272.

Striking out Pleading when Applications to Strike out ought to be made—See PRACTICE (51); *Ballarat Banking Co., Limited v. Wall*, 157.

Supreme Court (Constitution) 1852 (No. 10), sec. 19 repealed by sec. 2 of Judicature Act 1883 (No. 761); *Reg. v. Bailes*, 29.

Taxation of Costs—See PRACTICE (7); *In re Chambers, ex parte Speed*, 125.

——— (2.) Attorney and client—Retention of the amount of a bill of costs by a solicitor out of moneys of the client is not necessarily payment of the bill by the client — If the client appear to have been under pressure to

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assent to the detention of the amount, and has not had an opportunity of examining the bill, he is not to be regarded as having paid the bill so as to preclude the taxation of it, but if the client knows and consents to retention by the solicitor, such retention may amount to payment - Common Law Procedure Statute 1865 (No. 274), sec. 388; *Re Duffett and Manton*, 191.

Terms, Abolition of—See PRACTICE (16); *Reg. v. Bailes* 29.

——— (2.) See JUDICATURE ACT 1883 (2); *Husband v. Husband*, 60.

Third Party—See PRACTICE (34); *Round v. Victorian Stevedoring and General Contracting Company, Limited*, 88.

Threats—See EVIDENCE (8); *Reg. v. O'Brien*, 95.

Time, Contract to give—See PROMISSORY NOTE (2); *Cavalier v. Batchelder*, 199.

Tracks, Casts of—See EVIDENCE (8); *Reg. v. O'Brien*, 95.

Trade Mark, Infringement of—Injunction—Label—The test to be applied in cases of this sort is whether the amount of resemblance is such as would be likely to deceive an incautious purchaser not seeing or having the opportunity of seeing the two labels in juxtaposition, but seeing the one complained of singly and apart from the one which bears the registered design of the plaintiff; *The Hop Bitters Manufacturing Co. v. Wharton*, 176.

——— (2.) Rules of Supreme Court 1884, Order XXVII., rule 11 —Costs—Where the defendants have innocently and in ignorance infringed the rights of other traders, and have compelled the latter to resort to legal proceedings they should bear the costs—Power of judge to receive evidence of facts by which his discretion as to costs may be regulated in applications under Order XXVII., rule 11, for judgment on default of delivering a statement of defence—Injunction order; *Siegert v. Laurence*, 200.

——— (3.) Injunction — An injunction will not be granted to restrain the use of a trade mark where the words complained of are merely words of description, and do not belong exclusively to one party; *The Hop Bitters Manufacturing Co. v. Luke*, 89.

Trade Marks' Statute 1864 (No. 221), sec. 2—Trade Marks Registration Act 1876 (No. 539) — Infringement of trade mark — Borax — Old and new law —The word *Borax* cannot be registered as a trade mark under Act No. 539—It cannot be appropriated as a trade mark under the old law; *Lewis v. Klapproth*, 192.

——— (2.) Sec. 4 - Justices of the Peace (Prohibition) Act 1877 (No. 571), sec. 4—Amendment of Informalities Act 1884 (No. 810), sec. 6 - Prohibition—Conviction - Justices have no power under sec. 4 of Act No. 221 to order imprisonment in default of distress as a means of enforcing payment of the fine—An order so drawn up can be amended under sec. 6 of Act No. 810—The rule that costs should not be awarded against justices for errors committed in the discharge of their duties cannot be adhered to in future cases if justices do not enforce care and attention on the clerks of Petty Sessions in drawing up the memorandum or minute of their decisions; *Reg. v. Alley, ex parte M'Queen*, 169.

Transfer of Land Statute—Mortgage — Voluntary conveyance —Notice—Costs; *Shackell v. Lindsay*, 118.

——— (2.) **1866** (No. 301), secs. 2, 4, 15, 17, 21, 22, 25, 29, 34, 43, 135, 136, 152 - Transfer of Land Statute (Dower) 1869 (No. 353), sec. 11—Transfer of Land Statute (Easements) 1878 (No. 610), secs. 2, 3, 4—Summons to registrar to restrain issue of certificate of title —The Act No. 610 is declaratory—The Commissioner of Titles has power to enter upon a certificate the easement appurtenant to the dominant tenement, the registration of which is applied for; *Re The Transfer of Land Statute, ex parte The Metropolitan Building Society*, 171.

——— (3.) sec. 42 — See LOCAL GOVERNMENT ACT 1874 (13); *Kirkham v. Julien*, 253.

——— (4.) sec. 42 - Unregistered lease — Destruction — Statute of Frauds — Sec. 42 of the Transfer of Land Statute does not make a lease which is not registered void, but makes it of no effect as against a subsequent registered conveyance of the land—If a lease be destroyed so that its registration be made impossible, it would still be valid between the parties as a contract; *Morrissey v. Clements*, 107.

——— (5.) sec. 117—Judicature Act 1883 (No. 761), secs. 10, 19—Rules of Supreme Court 1884, Order LXIII., r. 2* — Caveat — A judge in Chambers has power to hear applications to delay dealings with land under the Transfer of Land Statute 1866; *Re the Transfer of Land Statute, ex parte Peck*, 162.

——— (6.) sec. 132—*Mandamus*—Circumstances under which the Court will grant a *mandamus*, calling on the Registrar of Titles to call in a certificate of title or to give his reason for not doing so; *Re O'Connell*, 85.

Trespass—See POLICE OFFENCES STATUTE 1865 (1)—*Reg. v. Garside, ex parte Briggs*, 152.

Trespass Fees—See POUNDS ACT 1874 (3); *Reg. v. Hutchinson, ex parte Jessell*, 161.

Trial, Notice of—See PRACTICE (70); *Smith v. Musgrove*, 178.

Trusts—Where an administratrix purchases property by means of property left by the intestate, the acquired property is subject to the same trusts as the original property; *Crow v. Campbell*, 34.

Vacation, Signing Judgment in—See INSTRUMENTS AND SECURITIES STATUTE 1864 (2); *Phillips v. Fitts*, 158.

Vendor and Purchaser—Implied warranty—Where the goods sold are not of a specific description or where they are not *in esse* or are incapable of being inspected by the purchaser, an implied warranty arises that the goods are *merchantable*—Where there is an implied warranty that goods are merchantable, and the goods delivered are different to those bargained for the purchaser has a right to keep and use such goods, and either set up their inferior quality as an answer to an action brought for the price of them, or institute an action for any loss he has sustained by reason of their inferiority; *Thomas v. Marks*, 91.

Venue, Change of—See PRACTICE (3); *Patterson v. Luke*, 140.

Victorian Racing Club Committee—The committee of the Victorian Racing Club have power to expel a member of the club, and the Court will not review their decision; *Barnard v. Purves*, 230.

Voluntary Settlement See HUSBAND AND WIFE (4); *Howell v. Harding*, 246.

Warden, Jurisdiction of—See MINING STATUTE 1865 (2); *Reg. v. Philps*, 13.

Warranty, Implied — See VENDOR AND PURCHASER; *Thomas v. Marks* 91.

Will - See PRACTICE (Probate.)

Witness—See EVIDENCE (2); *Merry v. Reg.*, 14.

Writ, Renewal of—A judge has no power to order the renewal of a writ after it has expired; *Hepburn v. Dawbin*, 129.

——— (2.) **For Service out of the Jurisdiction** — See PRACTICE (23); *Priestly v. Davis*, 18.

——— (3.) **Specially Endorsed, Form of**—See PRACTICE (30); *M'Vean v. Miller*, 268.

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Appeal, Notice of—See RAILWAY.

Criminal Law Consolidation Act, No. 38 of 1876, sec. 377—Child under ten years of age—Admissibility of evidence—The evidence of a child (aged six years) who stated that she did not know the difference between truth and falsehood cannot be received under sec. 377; *Reg. v. Montana*, 232.

Fire Insurance — Policy — Renewal of Policy—Appropriation of payments; *Kirkpatrick v. South Australian Insurance Company, Limited*, 137.

Fraudulent Intent - Appropriation of trust moneys by trustee; *Reg. v. Bolte*, 187.

Gaming — Public place — The Totalisator Repeal Act (282 of 1883) provides that every person betting or offering to bet by way of wagering or gaming in any public place, or in any place to which the public shall have access, shall be liable, etc. *Held*, that a bet made within an enclosure on a racecourse which was set apart for the members of a club, did not come within the provisions of this clause, although such enclosure was previously a place to which the public were allowed access; *Reg v. ——*, 6.

Insolvency Act 1860 sections 41, 175—Deed of assignment—A deed of assignment can be set aside within two months of the date of its execution, on the ground of fraud, under sections 41 and 175 of the Insolvency Act 1860; *Re Goldsick*, 233.

Marine Insurance—Usage—At and from—Full and complete cargo—Insurable interest; *Adelaide Marine and Fire Insurance Co v. Colonial Insurance Co. of New Zealand*, 71.

Negligence - See RAILWAY.

Policy of Assurance—Verdict against weight of evidence—Opinion of judge trying the case—The Court will not grant a new trial on the ground that the verdict was against the weight of evidence solely because the judge who presided at the trial was dissatisfied with the verdict, if the jury found such a verdict as reasonable men might arrive at; *Burns v. National Fire Insurance Co.*, 40.

Public Place - See GAMING.

Railway — Liability of Commissioner - Fires - Negligence Practice - In an action against the Commissioner of Railways for damage to the plaintiff's land, caused by a fire spreading from the railway line, it was shown (1) that one of the Commissioner's servants saw the fire prior to its spreading to the respondent's land, but failed to give any signal of its existence, or to take any steps towards putting it out; and (2) that the line between the respondent's fence and the rails had not been properly cleared away, a certain mallee stump with withered shoots growing therefrom, which enabled the fire to communicate with the herbage and vegetation. *Held*, that these facts were sufficient evidence of negligence to go to a jury. Although the Local Courts' Act provides "that the notice of appeal shall be in writing, signed by the party appealing, or his attorney, and shall be lodged with the Clerk of the Court, or sent to him by post." It is sufficient if such notice be sent by telegraph; *Ramsay v. Taylor*, 4.

——— (2.) **Bye-laws** - Contract notice—Effect of passenger ticket—A ticket issued by a railway company to convey A to B is not the contract between the passenger and the company; and a passenger who purchases a ticket is not bound by any conditions or regulations referred to on the ticket as in force without notice of the existence of such at the time the money for the journey was paid; *Playford v. Harry*, 134.

Registration - Specific performance - Parol contract A. and B. were partners, in a certain pastoral estate known as N., of which B. was registered lessee. B. verbally agreed to give A. the property known as N. in satisfaction of a partnership debt. A. continued in possession and improved the estate. B. assigned his interest in the lease for valuable consideration to C., who had notice of the verbal agreement between A. and B. - C. registered his deed of assignment under the Registration Act—*Held* (1.) That there was sufficient part performance on the part of A. to take the case out of the Statute of Frauds; (2.) that the Registration Act did not affect the transaction, as A.'s contract was verbal and incapable of registration. *Semble*, had A.'s contract with B. been in writing, it would have been within the Registration Act, and would have been fraudulent, void, and postponed to that of C.; *Neaylon v. Neaylon*, 41.

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